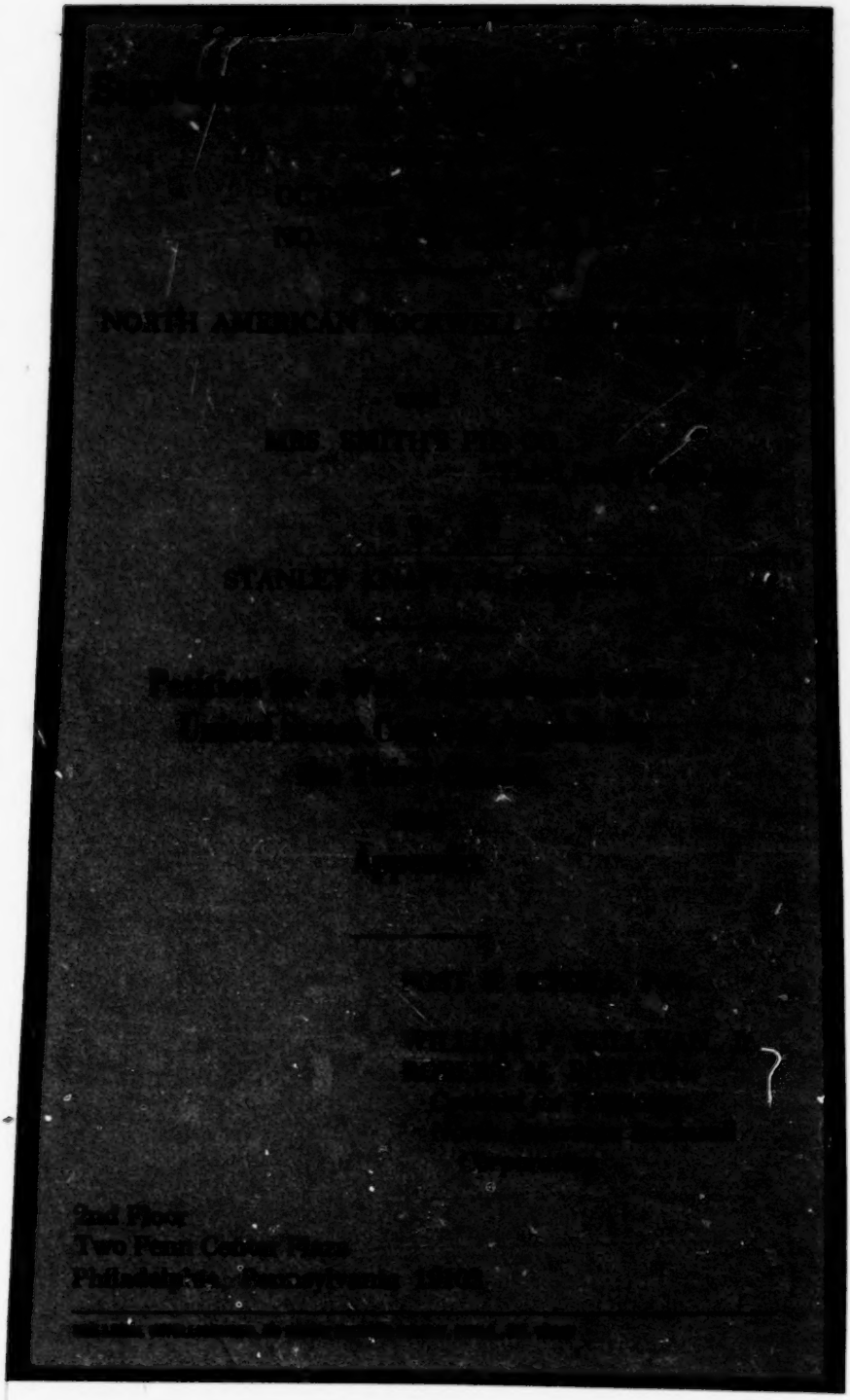

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IN THE

Supreme Court of the United States

October Term, 1975

No.

NORTH AMERICAN ROCKWELL CORPORATION,
Petitioner

and

MRS. SMITH'S PIE CO.,
Third Party Defendant

v.

STANLEY KNAPP, Jr., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Appendix

Petitioner, North American Rockwell Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on December 27, 1974. The opinion of the District Court Judge denying respondent's motion for reconsideration is unreported and is printed in the Appendix at 8a. The opinion of the Court of Appeals reversing the judgment of the District Court is printed in the Appendix at 23a.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District court was entered December 27, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Did the Court of Appeals err in accepting jurisdiction and refusing to dismiss the appeal as untimely?

II. Did the Court of Appeals err in failing to properly apply Pennsylvania law?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in Question I. are Rule 4(a) Federal Rules of Appellate Procedure and Rules 59(e) and 6(b) Federal Rules of Civil Procedure (A. 47a-52a) The statutory provisions involved in question II. are 12 Purdons Pennsylvania Statutes, §31 and 15 Purdons Pennsylvania Statutes, §2111. (A. 52a-54a)

STATEMENT OF THE CASE

1. *Procedural*

This diversity matter is products liability action instituted by respondent, Stanley Knapp, Jr. against petitioner, North American Rockwell Corporation, a Delaware Corporation.

On June 19, 1973, petitioner filed a motion for summary judgment. This motion was granted by order entered on September 6, 1973. On October 11, 1973, respondent filed a motion for rehearing and reconsideration under Federal Rule of Civil Procedure 59(e). This motion was denied by opinion and order dated November 21, 1973. On December 14, 1973, that order was appealed to the United States Court of Appeals for the Third Circuit. After respondent took that appeal, petitioner filed a motion to dismiss on the grounds that the appeal was untimely. That motion was denied without hearing by Judge Hunter for the court on February 27, 1974. By opinion and order filed December 27, 1974, the judgment of the District Court was reversed by the Court of Appeals and the matter was remanded for further proceedings.

2. *Factual*

On October 6, 1969, respondent, an employee of Third Party Defendant, Mrs. Smith's Pie Company, was allegedly injured when his hand caught in a chain in a machine known as a "Packomatic". Respondent alleged that the machine was negligently designed and manufactured. There is no dispute that the machine was manufactured by a company known as Textile Machine Works and delivered to plaintiff's employer in 1966/1967.

On April 5, 1968, petitioner entered into an agreement with Textile Machine Works (hereinafter referred to as "TMW") whereby petitioner purchased most of TMW's assets in exchange for stock. As part of the agreement,

petitioner assumed certain liabilities but specifically did not assume others.

Closing pursuant to the agreement took place on August 29, 1968. On October 6, 1969, respondent was injured. TMW remained in existence until February 20, 1970, when it was dissolved.

TMW was not sued in the instant litigation, however, respondent brought a separate litigation against TMW in the Court of Common Pleas of Philadelphia County, Pennsylvania on July 13, 1972. The instant suit was instituted on March 22, 1971, against only petitioner which later joined the respondent's employer, Mrs. Smith's Pie Company as a third party defendant.

In response to respondent's appeal from the grant of a summary judgment in favor of petitioner by the District Court, petitioner raised two arguments: (1) That the appeal was untimely and that therefore the Court of Appeals lacked jurisdiction; and (2) That the action of the District Court in granting summary judgment was proper. Although the issue of the timeliness of the appeal was both briefed and presented at oral argument, the Court of Appeals did not address itself to that issue in its opinion and order of December 27, 1974.

In this petition petitioner raises both the jurisdictional question of whether or not the appeal to the Court of Appeals was timely and the question of whether the Court of Appeals improperly reversed the grant of summary judgment by the District Court.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erred in Refusing to Dismiss the Appeal as Untimely.

It is petitioner's contention that since the appeal to the Court of Appeals was untimely, that Court, therefore, had no jurisdiction to entertain the appeal from the District Court which had entered a final judgment in favor of this petitioner. This Court had repeatedly stated that time requirements are "mandatory and jurisdictional", and if not filed within the time alloted the appeal is lost. *United States v. Robinson*, 361 U.S. 220, 229 (1960); see also *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2nd Cir. 1967); *Shotkin v. Weksler*, 254 F.2d 596 (5th Cir. 1968), both holding that timeliness is a jurisdictional question which may be raised at any time.

Unless this Court accepts jurisdiction at this time to decide the question of timeliness, that issue will be forever precluded since once this case is remanded to the District Court for further proceedings as required by the Court of Appeals' order, the issue of the timeliness of the prior appeal will become moot. This Court has stated that on a Writ of Certiorari, it must be determined whether a court of appeals has jurisdiction. *Shanferoke and Supply Corp. v. West-Chester Service Corp.*, 293 U.S. 449 (1935). Conversely, if a court of appeals has no jurisdiction to hear the appeal in the first instance, then a Writ of Certiorari questioning the timeliness of that appeal, although appearing on its face to be interlocutory, is actually an appeal from a final order. In *Stratton v. St. Louis S. W. Ry.*, 282 U.S. 10 (1930), this Court stated:

> "When it appears, on an appeal to this Court from a decree of the Circuit Court of Appeals, that the latter court has acted without jurisdiction in entertaining the appeal from the District court, *the appropriate action of this Court is to reverse the decree of the Court of Appeals and remand the case with direc-*

tions to dismiss the appeal to that Court for want of jurisdiction." 282 U.S. at 18 (emphasis added)

It is the foregoing remedy which is herein requested.

In the case at bar, petitioner's motion for summary judgment was granted September 5, 1973 and docketed September 6, 1973. It was not until October 11, 1973, 35 days later and 25 days after the time for filing such motions had expired, that respondent filed a motion for rehearing and reconsideration and on November 21, 1973, an order was entered denying this motion. On December 14, 1973, a notice of appeal to the United States Court of Appeals for the Third Circuit was filed appealing the District Court's order of November 21, 1973. It is that appeal that the petitioner contends is untimely and therefore the Court of Appeals lacks the jurisdiction necessary to hear the case on its merits. After the appeal was filed, petitioner filed a motion to dismiss the appeal as untimely, however, that motion was denied by Judge Hunter's order dated February 27, 1974. Although petitioner again raised the timeliness of the appeal in brief and argument before the Court of Appeals, that issue was not considered by the court in its opinion and order of December 27, 1974.

Respondent's notice of appeal stated that it was from the order of November 21, 1973 (denying rehearing and reconsideration) however, the appeal is actually from the original order of September 5, 1973, granting summary judgment. The denial of rehearing is not appealable. *Gainey v. Brotherhood of Railway and Steamship Clerks Etc.*, 303 F.2d 716 (3rd Cir. 1962); *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2nd Cir. 1967). Since respondent's appeal was perfected well beyond the 30 day appeal period as calculated with respect to the order granting summary judgment, "the decisive issue is whether the motion for reargument . . . stopped the running of the appeal time". *Gainey, supra.*, at 718.

Rule 4(a) of the Federal Rules of Appellate Procedure (F.R.A.P.) provides that the running of the time for filing

an appeal is terminated by certain *timely* motions filed in the district court. Included are motions under Rule 59(e), Federal Rules of Civil Procedure (F.R.C.P.) to "reconsider and reargue". 9 Moore's Federal Practice §204.12(i), at 951; *Gainey, supra*, at 718.

By the express terms of Rule 4(a) F.R.A.P., only a timely motion under Rule 59(e) F.R.C.P. will terminate the time for appeal, and to be timely such a motion must be filed within ten (10) days after the entry of judgment. 9 Moore's Federal Practice, *supra.*, at 954; *Shotkin v. Weksler, supra.* Moreover, Rule 6(b) F.R.C.P. specifically states that the Court "may not extend the time for taking any action under Rules. . . 59(e)."

The docket entries submitted as part of the certified record to this Court show that at no time did the District Court take action to extend the ten (10) day time period for filing a motion for rehearing under Rule 59(e). However, in response to petitioner's motion to dismiss the appeal, respondent's counsel averred that on the last day for filing his motion for rehearing and reconsideration, he was granted an *ex parte* enlargement of the inflexible ten (10) day rule by the trial judge's law clerk. Counsel then contended that this undocumented telephone call with an unnamed individual was sufficient to bring this matter within the narrow exception to the inflexible ten (10) day rule carved out by this Court, that being where the movant had been "induced to forego" filing his notice of appeal by some action by this District Court indicating the timeliness of an untimely post-judgment motion. Since respondent's averments re the "unique circumstances" are contained in a verified memorandum presented to the Court of Appeals and since those allegations are crucial regarding the issue of timeliness, a copy of that memorandum and accompanying letter of respondent's counsel dated September 17, 1973 are included in the accompanying Appendix at pp. 15a-21a.

In three cases, this Court has developed a narrow exception to the strict mandate of Congress in establishing

an inflexible ten (10) day time period by Rules 6(b) and 59(e) F.R.C.P. First, in *Harris Truck Lines Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), petitioner's general counsel was away on vacation when the original judgment was entered and in view of the inability of trial counsel to contact him before the thirty day time limit prescribed by Federal Rule of Civil Procedure 73(a) (now F.R.A.P. 4(a)), trial counsel came before the District Court with notice to and in the presence of opposing counsel, asked for and was granted a two (2) week extension. Thereafter the Court of Appeals dismissed the appeal as untimely on grounds that there was no basis for a finding of "excusable neglect" and hence no basis for waiving the thirty (30) day limit. This Court granted a Writ of Certiorari and vacated the judgment indicating the circumstances were "unique" and stated its reasons as follows:

> "In view of great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling." 371 U.S. at 217 (emphasis added)

Then in *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964), this Court applied the rationale of *Harris, supra* in creating a very limited exception to the inflexible ten (10) day rule for filing post-judgment motions. There the trial court had specifically declared on the record to an unrepresented immigrant petitioner that his untimely post trial motion was "made in ample time". As a result the petitioner did not file his appeal within the original sixty (60) day period but waited until the sixty (60) day period after dismissal of the post trial motion. The

Court of Appeals dismissed since the post trial motions, filed beyond the inflexible ten (10) day period, did not toll the running of the appeal and the appeal was therefore untimely. This Court vacated the Court of Appeals' dismissal in view of the following "unique circumstances": (1) Petitioner did an act which, if properly done, postponed the deadline for filing his appeal; (2) the District Court concluded the act had been properly done; and (3) the petitioner relied on the statement of the District Court judge and filed the appeal within the assumedly new deadline but beyond the old deadline. 375 U.S. at 387.

And in *Wolfsohn v. Hankin*, 376 U.S. 203 (1964), the petitioner asked for and was granted a signed order by the District Court extending for two weeks the time to move for rehearing under Rule 59(e) F.R.C.P. Thereafter, the Court of Appeals dismissed on grounds that the ten (10) day period under Rule 59 may not be enlarged by the court under Rule 6(b) F.R.C.P. Again this Court granted certiorari to vacate the judgment citing only its prior two decisions in *Harris* and *Thompson*.

Despite the compelling circumstances in both *Wolfsohn* and *Thompson*, both of which the District Court granted an extension on the record and misled the appellant, a dissenting opinion was filed by Mr. Justice Clark from the opinion of the Court permitting the appeals, with Mr. Justice Stewart, Mr. Justice Harlan and Mr. Justice White joining. Mr. Justice Clark pointed out that although an extension is permissible under Rule 73(a) if "excusable neglect" is shown, Rule 6(b) specifically says that the Court may not extend the time for taking any action under Rule 59(e). *U.S. v. Robinson*, 361 U.S. 220, 229 (1960). For that reason, Mr. Justice Clark distinguished *Harris* upon which the majority relied, for the reason that *Harris* involved a properly entertained motion to enlarge for "excusable neglect" under Rule 73, from *Thompson* as follows:

> "That [the extension under Rule 73(a) in *Harris*] is a far cry from this case where the trial court had no jurisdiction to pass upon the untimely motions to amend the findings and for a new trial . . . the error of the trial judge in entertaining the motions [to enlarge the time contrary to the specific prohibition of 6(b)] could not be validated by the acquiescence of the Government. It is elementary that the parties cannot confer jurisdiction on the court". *Thompson v. I.N.S.*, 375 U.S. at 389.

And in his dissent in *Wolfsohn*, Mr. Justice Clark points out that by not following the "unambiguous mandates of Congress" set forth in Rule 6(b) the Rules will be totally "subverted" causing a state of "hopeless confusion" which certainly was not contemplated by the Court in *Harris*.

The fears of Mr. Justice Clark have become a reality in the case at bar. Although the Court in *Thompson* limited its application to the exceptional circumstances where the district court had entered on the record an erroneous ruling enlarging the time, in the case at bar no such circumstances are present. Rather, an unsupported self-serving statement by counsel regarding a conversation with the trial judge's clerk allegedly extending the time is the sole basis for enlarging the inflexible ten (10) day time period for an additional twenty-five (25) days. Moreover, the alleged extension granted by the judge's law clerk is contradicted by a letter from respondent's counsel to the trial judge dated the last day for filing a Rule 59 motion which indicates that counsel is *requesting* not confirming an extension of time.[1] This request was never granted, nor was a formal motion to enlarge the inflexible ten (10) day

1. This letter of respondent's counsel dated September 17, 1973, (the 10th and last day to file under Rules 59(e) and 6(b) F.R.C.P.) reads as follows: "I trust that the time for filing a petition for reconsideration will be enlarged." (A. 21a)

period ever filed, nor did the District Court take any action on the record.[2]

Certainly if this Court permits the clear mandate of Congress and its "narrow exception" carved out by the *Thompson* and *Wolfsohn* decisions to be subverted on the facts of the case at bar, the hopeless confusion feared by Justices Clark, Harlan, Stewart and White have indeed become a reality. It was for this reason that Mr. Justice Clark in his dissent in *Thompson* concluded as follows:

> "Rules of procedure are a necessary part of an orderly system of justice. Their efficiency however, depends upon the willingness of the Courts to enforce them according to their terms. Changes in rules whose inflexibility has turned out to work hardship should be effected by the process of amendment, not by *ad hoc* relaxations by this Court in particular cases. Such dispensations in the long run actually produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar". 375 U.S. at 390.

In this case the inflexible time period was not extended formally on the record nor was the respondent misled to thinking that such an extension was granted.

Accordingly, it is requested that certiorari issue since the Court of Appeals has decided a federal procedural question in conflict with applicable decisions of this court. Rules of the Supreme Court of the United States 19(1)(b).

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2. See *Flint v. Howard*, 464 F.2d 1087 (1st Cir. 1972), where the Court interpreting the "Thompson-Wolfsohn" rationale held that the district court's consideration on its merits of an untimely motion for reconsideration was not sufficient to invoke the "extraordinary circumstance" doctrine since "the District Court did not in any way contribute to petitioner's failure to take an appeal within the alloted time".

II. The Court of Appeals Erred in Failing to Apply Pennsylvania Law.

It is petitioner's contention that the agreement whereby Rockwell purchased most of the assets of TMW, represents a sale in which case it would not have any responsibility for liabilities of the seller, TMW, not assumed by it. Both in the District Court and before the Court of Appeals, both parties argued that this case was controlled, in part, by the doctrine stated in *Shane v. Hobman*, 332 F. Supp. 526, 527 (E.D. Pa. 1971), which holds that the sale of corporate property by one company to another does not make the purchaser liable for liabilities of the seller not assumed by it, unless one of four exceptions are applicable:

> "There are, however, certain exceptions to this Rule. Liability for obligations of a selling corporation may be imposed on the purchasing corporation when (1) the purchaser expressly or impliedly agrees to assume such obligations; (2) the transactions amount to a consolidation or a merger of the selling corporation with or into the purchasing corporation; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape liability of such obligations." *Kloberdanz v. Joy Manufacturing Co.*, 288 F. Supp. 817, 820 (D. Col. 1968)

It is petitioner's contention that the foregoing constitutes the law of Pennsylvania re a sale of corporate assets and that by not applying that law the Court of Appeals was in error and same constitutes grounds for this court to issue a Writ of Certiorari. Rule 19(1)(b) Rules of the Supreme Court of the United States.

In a diversity action, it is the task of the federal court to apply the laws of the state as announced by the state's highest court or that which it finds to be the law of the state. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). In this respect, a federal court is said to be sitting as a state court. *Bernhardt v. Polygraphic Co. of America, Inc.*, 350

U.S. 198 (1958) and its job is to apply, not change, that state law.

Although the Court of Appeals acknowledged that the general rule of *Shane v. Hobman, supra*, is the general rule of all jurisdictions, including Pennsylvania, which have considered the question of the effect of a sale of a corporation's assets (A. 26a), it did not apply that rule in the case at bar.

Before the Court of Appeals, respondent argued that the transaction between petitioner and Textile Machine Works amounted to a de facto merger and therefore imposed liability on petitioner for damages caused by machines previously manufactured by TMW rather than a sale which respondent acknowledged would not impose any liability on petitioner for machines previously manufactured by TMW. The Court of Appeals analyzed numerous decisions decided under jurisdictions other than Pennsylvania and concluded that they "suggest that the arrangement between Rockwell and TMW should be considered a sale rather than a merger or a continuation, since TMW did not officially terminate its corporate existence for 18 months after the exchange and throughout that period possessed valuable assets with which to respond to court claims similar to the one now advanced". (A. 32a-33a) However, the court noted that no prior cases decided under Pennsylvania law have considered the problem presented to it (A. 29a) and therefore it must "apply the law we believe a Pennsylvania appellate tribunal would adopt if the case arose in the state court" (A. 33a). The court then concluded that Pennsylvania would look to find a cause of action in favor of an injured party since Pennsylvania public policy "is served by imposing liability on the defendant rather than formal or technical requirements" (A. 33a). The Court of Appeals' conclusion was that a Pennsylvania court would consider "where the burden of loss should be imposed (A. 37a) and "the importance of insurance in performing the loss-spreading function" and would impose liability on petitioner since "as between these two parties

Rockwell is better able to spread the burden of loss' (A. 38a). It was for these reasons that despite finding that on the facts of the case at bar and the law of all jurisdictions that the transaction would be considered a sale and hence no liability would be imposed upon petitioner that in order to fashion a remedy to the injured plaintiff, it should be construed to be a merger. (A. 39a).

For three reasons the Court of Appeals erred in its foregoing analysis. Initially, although it concluded that no Pennsylvania appellate tribunals have addressed the problem, this is incorrect. In *Granthum v. Textile Machine Works*, 230 Pa. Superior Ct. 199 (1974), the Pennsylvania Superior Court considered the very same transaction between petitioner and TMW which is presented in the case at bar. Although it reversed a summary judgment in favor of petitioner for technical reasons that plaintiff had not been permitted sufficient discovery, it implicitly acknowledged that the law of Pennsylvania is the general law of nonliability as set forth in *Shane v. Hobman, supra.*

> "It may be that appellant will not be able to demonstrate any facts which will remove Rockwell from the *general rule of nonliability*" 230 Pa. Superior Ct. at 203 (emphasis added).

Secondly, the Court of Appeals erred in finding that the "spreading of the loss theory" is the public policy which would apply in the case at bar. Pennsylvania public policy is clearly reflected in statutes dealing with the length of time for which a corporation which dissolves remains responsible for its liabilities. This Statute, 15 P.S. §2111, provides that a dissolved corporation, its directors and shareholders may be sued for any pre-existing liability for a period of two (2) years after the date of dissolution but that thereafter that corporation and its shareholders, directors, etc. have no further responsibility. This Statute, therefore, is a reflection of the Pennsylvania public policy that a corporation such as the manufacturer in the case at bar, TMW, has a certain time from for which it can be responsi-

ble to answer in damages for pre-existing contingent liabilities but after that time period expires so does that responsibility. In the case at bar, the manufacturer of this machine, TMW, would have been liable to respond in damages to Stanley Knapp until February 20, 1972.

In support of its public policy argument, the Court of Appeals cites *Ayala v. Philadelphia Board of Education*, 453 Pa. 584 (1973) and *Falco v. Pados*, 444 Pa. 372 (1971), as being a reflection of the Pennsylvania Supreme Court's solution as to "where the burden of loss should be imposed". However, both *Ayala* and *Falco* consider different types of policies than those presented in the case at bar, and neither, therefore, are a reflection of what a Pennsylvania court would do on these facts. Moreover, it is apparent by the Court of Appeals' citation of both *Ayala* and *Falco* that its intent, in the case at bar, was to change Pennsylvania law on public policy grounds rather than apply the applicable Pennsylvania law and clearly the Court of Appeals had no authority to change Pennsylvania law, *supra* at 12. In *Ayala*, the Pennsylvania Supreme Court abolished local governmental immunity and in *Falco* it abolished parental immunity. In both, the court concluded that public policy mandated the abolition of an immunity which "unjustifiably" required an injured party to assume a burden of loss alone, especially in light of universal liability insurance (A. 37a).

In the case at bar the respondent, contrary to the conclusion of the Court of Appeals, did not face the "melancholy prospect of being barred from his day in court unless petitioner is held subject to suit" (A. 39a). On the contrary, TMW remained in existence until February 20, 1970, when it dissolved and was subject to suit for two years thereafter. 15 P.S. §2111. Pennsylvania has a two year statute for personal injury. 12 P.S. §31. Therefore respondent, being injured on October 6, 1969, had until October 6, 1971, to file suit against TMW, its directors and shareholders and in fact respondent did sue TMW on July 13, 1972. It was, however, as a result of respondent's delay in

instituting that suit against TMW that any right of recovery which respondent had against that company was terminated as a result of expiration of the statute of limitations. Therefore, Knapp can hardly be said to have been confronted with the melancholy prospect of being barred from his day in court since a valid and enforceable action against Textile Machine Works was available to him to the same extent as to any other claimant against any other defendant.

Thirdly, a Pennsylvania court in applying the public policy of that State would uphold the intent of the parties as set forth in the contract between petitioner and TMW. In several cases the Pennsylvania Supreme Court has stated that a contract between two individuals or corporations relating to private affairs must be enforced unless it is so obviously against the public health, safety, morals or welfare that a court may constitute itself the voice of the people and declare a contract void. *Book's Estate*, 297 Pa. 543 (1929); *Jacob Siegel Co. v. Philadelphia Record Co.*, 348 Pa. 245 (1944). Moreover, the Pennsylvania Supreme Court has stated that the "intention of the parties is controlling when a court construes an agreement". *Kennedy v. Erkman*, 389 Pa. 651 (1957). Clearly, the contract between petitioner and TMW involving a sale of assets of a corporation is not against public policy. Therefore, the intention of the parties in the case at bar expressed in the agreement and instrument of assumption must be applied and that instrument of assumption provides that petitioner did not assume the liability in question. (Footnote 6 of Court of Appeals Opinion, A. 27a). Finally, Pennsylvania public policy on this issue has been expressed in the dissolution statute which limits the time a dissolved corporation may be sued for pre-existing contingent liabilities to two years (2) beyond the date of its dissolution. 15 P.S. §2111.

As a matter of public policy, in addition to the foregoing, it is submitted that unless the Court of Appeals is reversed, the effect of its ruling will strongly limit the purchase and sale of businesses. For example, would a pro-

spective purchaser of all of the assets of a business purchase that business if it was also purchasing contingent liabilities arising from machines manufactured many years before by the selling corporation? Although the Court of Appeals implied that insurance is available to cover such contingencies, this is not always the case and such insurance might be prohibitive in costs.

The long reaching effect of the Court of Appeals decision will be to substantially limit the sale of a corporation's assets for no corporation will want to get involved in a purchase where it has no idea what it is buying and cannot be effectively indemnified since by the time the liability arises the selling corporation may be dissolved.[3] In addition, the net effect of the Court of Appeals decision would be to penalize the owners of small businesses who will not be able to sell that business as a going entity but rather will be limited to the value of its used assets and equipment. It is therefore submitted that the effect of the Court of Appeals decision will be to substantially limit business transactions and certainly such a result would not be favored by Pennsylvania courts.

CONCLUSION

The clear mandate of Congress in enacting Rules 6(b) and 59(e) F.R.C.P. was to create an inflexible ten (10) day limit for filing post-judgment motions which alone toll the time for appeal. Although this Court has carved out a narrow exception to this rule where justice requires, it is submitted that the undocumented statement of counsel of a conversation with the trial judge's law clerk, without any action formal or informal taken by the District Court to ex-

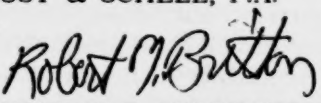
3. In fact in *Kloberdantz v. Joy Manufacturing Co.*, 288 F. Supp. 817 (D. Colo. 1968), *Bazan v. Kux Machine Co.*, 358 F. Supp. 1250 (E.D. Wisc. 1973) and *McKee v. Harris-Seybold Company*, 264 A.2d 98 (N.J. 1970), all cited by the Court of Appeals, the seller was out of business for several years before the date of the accident and in each the court held the purchaser of assets not liable.

tend the time limit is insufficient to bring the instant case within the scope of those cases where the litigant was "induced to forego filing" by some action by the District Court. Moreover, unless this Court now takes jurisdiction of this case to clear up the apparent uncertainty of its rulings in *Thompson* and *Wolfsohn, supra*, the lower courts will remain in a state of "hopeless confusion" regarding the proper application of Rules 59(e) and 6(b) Federal Rules of Civil Procedure.

By changing the law of Pennsylvania to obtain a "deep pockets" result, the Court of Appeals has clearly abandoned its mandate to apply state law in a diversity action, not change it.

WHEREFORE, Petitioner prays that this Petition for a Writ of Certiorari be granted.

POST & SCHELL, P.A.

By: 

WILLIAM F. SULLIVAN, Jr.
ROBERT M. BRITTON
Counsel for Petitioner

DOCKET ENTRIES

71-668

1971		
1. March	22	Complaint filed.
"	22	Summons exit.
"	22	Jury trial demanded.
2. Apr.	29	Summons returned: "on 4/7/71 served" and filed.
3. June	10	Answer filed.
7. "	10	CASE LISTED FOR TRIAL.
4 Aug.	31	Plff 's interrogatories to deft, filed.
5. Dec.	2	Deft's answers to plff 's interrogatories, filed.
6. "	10	Plff 's notice of taking deposition of the Custodian of Records of Home Insurance Co., filed.
7. "	10	Plff 's supplemental interrogatories to deft., filed.
1972		
8. Mar.	20	Plff 's motion to compel answers to supplemental interrogatories, memorandum of law & notice of motion, filed.
9. Apr.	5	Deft's answers to plff 's supplemental interrogatories, filed.
10 May	25	Plff 's requests for admissions, filed.
11 Jun.	13	Deft's answer to plff 's request for admissions, filed.
Sep.	14	Pretrial conference, Powers, III, Magistrate.
12. "	14	Pretrial report, filed. (copies to counsel)
13. "	25	Plff 's notice of taking deposition of the Custodian of Records of S. H. Quint Ink Co., filed.
"	14	Pretrial conference, Powers, III, Magistrate.

	1972		
14.	Sep.	29	Amended pretrial report, filed.
	Dec.	5	Settlement Conference, Powers, III, Mg.
15.	"	11	Report of Settlement conference, filed. (Copies to Counsel)
16.	"	27	Motion of North American Rockwell Corp., for leave to join Mrs. Smith's Pie Co., as third-party deft., Notice of Motion & Memorandum of Law in support thereof, filed.
	1973		
(16)	Jan.	3	Order dtd 1/3/73 that deft. shall have 30 days from date of Order to file & serve a Complaint joining Mrs. Smith's Pie Company as a 3rd-pty deft., filed. 1/4/73 entered & copies mailed.
17.	"	10	Third party complaint of deft. North American Rockwell Corp., against third-party deft., Mrs. Smith's Pie Co., filed.
	"	10	Third-party summons exit.
18.	Feb.	23	Third-party summons returned: "on 2/19/73 served Mrs. Smith's Pie Co.", and filed.
	Mar.	26	Settlement Conference, Powers, III, J.
19.	"	28	Report of Settlement Conference, filed. (3/29/73 entered—copies mailed)
20.	Apr.	2	Appearance of Swartz, Campbell & Detweiler, Esqs. for Mrs. Smith's Pie Co., filed.
21.	"	2	Answer of third party deft. to third party complaint, filed.
22.	June	19	Deft's Motion for summary judgment, brief in support of same, affidavit of Barton L. Post, Esq. & notice of motion, filed.
23.	"	27	Plff's answer to deft's Motion for Summary Judgment; plff's Brief in oppo-

	1973		
			sition to deft's Motion for summary judgment, filed.
(22)	Sep.	6	Order that deft's. motion for summary judgment is Granted, filed. Entered & copies mailed 9/7/73.
24.	"	6	Order entering judgment in favor of North American Rockwell Corp. and against plff. Stanley Knapp with costs, filed. Entered & copies mailed 9/7/73.
25.	Oct.	11	Plff 's motion for rehearing and reconsideration, Notice of Motion & Memorandum of law, filed.
26.	"	16	Deft's answer to plff 's motion for rehearing & reconsideration & memor. of law, filed.
27.	Nov.	26	Memorandum, Troutman, J. and Order dtd 11/21/73 that plff 's motion for reconsideration of the order dtd. 9/6/73 is DENIED, filed. 11/27/73 entered & notice mailed.
28.	Dec.	14	Plff 's notice of appeal, filed. (cy. to U.S. Court of Appeals, Post & Schell, Esqs., and Swartz, Campbell & Detweiler, Esqs.)
29.	"	14	Copy of Clerk's Notice to U.S. Court of Appeals, filed. (copy to Judge Troutman)
	1974		
	Jan.	10	Record transmitted to U.S. Court of Appeals.
	1975		
30.	Jan.	16	Deft's notice of taking deposition of Stanley Knapp, filed.
31.	"	20	Certified copy of judgment in lieu of formal mandate received from U.S. Court of Appeals, that the judgment of this

1975			
			Court filed 9/6/73 & the order of this Court filed 11/26/73 are reversed, & the cause remanded for further proceedings, etc., Costs taxed against appellee, filed (1/21/75 entered & copy to Judge Troutman)
	Jan.	20	Record on appeal returned from U.S. Court of Appeals.
32.	Feb.	5	Report of Settlement Conference held on 2/5/75, re discovery, etc., filed. (2/6/75 entered)

Docket Entries

74-1110

Jan. 23	Copy of Notice of Appeal, rec'd December 19, 1973, filed.
	Record, rec'd January 11, 1974, filed.
	Appearance of Howard J. Creskoff, Esq.; Freedman, Borowsky and Lorry for appellant, filed.
Jan. 23	Motion by appellee, North American Rockwell Corporation, to dismiss appeal for lack of jurisdiction, with Memorandum of law in support of motion, filed. (4 cc.).
Jan. 25	Letter dated January 24, 1974 rec'd from John B. Day, Esq.; Swartz, Campbell & Detweiler stating they will not appear on behalf of Mrs. Smith's Pie Co.
Jan. 30	Appearance of Barton L. Post and Robert M. Britton, Esqs.; Post & Schell for appellee North American Rockwell Corporation, filed.
Jan. 30	Answer by appellant to appellee's motion to dismiss appeal, with Memorandum of law contra motion to dismiss appeal, filed. (4 cc.). Affidavit of service attached.
Feb. 6	Reply memorandum by appellee to appellant's answer, rec'd (4 cc.). Affidavit of service attached.
Feb. 25	Submitted on motion by appellee (North American Rockwell Corp.) to dismiss appeal. Coram: Hunter, Weis and Miller, D. J.
Feb. 27	Order (*Hunter*, Weis and Miller, D. J.) denying motion by appellee, North American Rockwell Corporation, to dismiss appeal for lack of jurisdiction, filed.
Feb. 28	Motion by appellant for leave to extend time to file brief and appendix to 40 days from February 28, 1974 (to April 9, 1974), filed. (4 cc.). Certificate of service attached.

1974

Mar. 11	Submitted on above motion. Clerk.
Mar. 13	Order *(Clerk)* denying appellant's motion for leave to extend time to file brief and appendix as presented. An extension of 30 days is granted. NO FURTHER EXTENSIONS WILL BE GRANTED, filed.
Apr. 1	Brief for appellant, filed.
Apr. 1	Appendix, filed.
Apr. 1	Affidavit of service of appellant's brief and the appendix by hand delivery on April 1, 1974, filed.
Apr. 25	Brief for appellee, filed. (25 cc.).
Apr. 27	Affidavit of service of appellee's brief by hand delivery on April 25, 1974, filed.
May 8	Reply brief for appellant, filed. (25 cc.).
May 9	Affidavit of service of appellant's reply brief by hand delivery on May 8, 1974, filed.
Aug. 28	Order, dated August 26, 1974 *(Aldisert,* J.) directing 15 mins. argument for each side, filed.
Sept. 10	Argued. Coram: Aldisert, Adams and Rosenn, C.J.
Dec. 27	Opinion of the Court (*Aldisert, Adams* and *Rosenn,* C.J.), filed.
Dec. 27	Judgment reversing the judgment of the District Court, filed September 6, 1973 and the order of the District Court, filed November 26, 1973 and remanding the cause for further proceedings consistent with the opinion of this Court; with costs taxed against appellee, filed.

1975

Jan. 9	Bill of costs for appellant, filed. Service attached.
Jan. 20	Certified judgment in lieu of formal mandate issued.
Jan. 20	Record returned to Clerk of District Court.
Jan. 24	Receipt for record from Clerk of District Court, filed.

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

STANLEY KNAPP — CIVIL ACTION

v.

NORTH AMERICAN
ROCKWELL CORP., *Defendant*

and

MRS. SMITH'S PIE CO.,
Third-Party Defendant — NO. 71-668

ORDER

AND NOW, this 5th day of September, 1973, Defendant's Motion For Summary Judgment is hereby granted.

BY THE COURT:

E. MAC TROUTMAN
J.

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

STANLEY KNAPP — CIVIL ACTION

v.

NORTH AMERICAN ROCKWELL CORP.

and

MRS. SMITH'S PIE CO. — NO. 71-668

MEMORANDUM AND ORDER

TROUTMAN, J. — NOVEMBER 21, 1973

On October 6, 1969, plaintiff, an employee of third-party defendant, Mrs. Smith's Pie Company, was injured when his hand was caught in an unguarded chain in a machine known as a "Packomatic". Plaintiff claims that the machine was negligently designed and manufactured. The machine was manufactured by Textile Machine Works [Textile] and was sold to Mrs. Smith's Pie Company in 1966 and was ultimately delivered in 1967. On April 5, 1968, Textile and defendant North American Rockwell Corporation [Rockwell] entered into an "Agreement and Plan of Reorganization". On September 3, 1968, Textile, pursuant to the agreement, changed its name to the TM Company and, as such, continued in existence. Ultimately, on August 29, 1969, Rockwell purchased substantially all of the assets of the TM Company and executed the "Instrument of Assumption". Thereafter, plaintiff was injured on October 4, 1969, the TM Company dissolved on February 20, 1970, and plaintiff instituted suit against Rockwell. Rockwell filed a motion for summary judgment on the ground that as a mere purchaser of corporate assets, it was not responsible for any liabilities not assumed by it. By order dated September 6, 1973, we granted defendant's motion for summary judgment and

before the Court is plaintiff's motion for reconsideration of that order.

Both parties agree that the controlling legal principles governing this case are set forth in *Shane v. Hobam, Inc.*, 332 F. Supp. 526 (E.D. Pa. 1971). In *Shane*, Judge Higginbotham expostulated on the assumption of liability by a purchasing corporation as follows:

> "The general rule is that 'a mere sale of corporate property by one company to another does not make the purchaser liable for the liabilities of the seller not assumed by it.' *Copease Mfg. Co. v. Cormac Photocopy Corp.*, 242 F. Supp. 993 (S.D.N.Y. 1965). [footnote omitted] There are, however, certain exceptions to this rule. Liability for obligations of a selling corporation may be imposed on the purchasing corporation when (1) the purchaser expressly or impliedly agrees to assume such obligations; (2) the transaction amounts to a consolidation or merging of the selling corporation with or into the purchasing corporation; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape liability for such obligations. *Kloberdanz v. Joy Manufacturing Co.*, 288 F. Supp. 817, 820 (D.Col. 1968)." 332 F. Supp. at 527-528.

Defendant, as a purchasing corporation, of course, argues that it is not legally responsible for the liabilities of the selling corporation not assumed by it. Plaintiff, on the other hand, argues that (1) Rockwell expressly or impliedly agreed to assume liability in tort for personal injuries; (2) the transaction amounts to a consolidation or merger of Textile with or into Rockwell; and (3) Rockwell is merely a continuation of Textile. There is no allegation that the "Agreement and Plan of Reorganization" was entered into fraudulently to escape such liability. Thus, it is now necessary to discuss the applicability of the first three exceptions to the facts of this case.

A.

The question whether Rockwell expressly or impliedly agreed to assume the liabilities of Textile is adequately answered by paragraph four of the "Agreement and Plan of Reorganization" entered into by the parties on April 5, 1968. At that time, as to assumption of liabilities, Rockwell and Textile agreed as follows:

> "4. *Assumption of Liabilities.* At the Closing NR shall, by appropriate written instrument or instruments, assume and agree to pay, perform and discharge when due all of the debts, liabilities, obligations and contracts of TMW existing on the Closing Date, except the following:
>
> "(a) liabilities against which TMW is insured or otherwise indemnified to the extent of such insurance or indemnification unless the insurer or indemnitor agrees in writing to insure and indemnify NR to the same extent as it was so insuring and indemnifying TMW; * * *".

At the closing on August 29, 1968, the parties executed the "Instrument of Assumption", which provided as follows:

> "Pursuant to Paragraph 4 of the Agreement and Plan of Reorganization dated April 5, 1968, (the 'Agreement') between North American Rockwell Corporation ('NR') and The Textile Machine Works ('TMW'), NR, intending to be legally bound, hereby assumes and agrees to pay, perform and discharge when due all of the debts, liabilities, obligations and contracts of TMW existing on the date hereof, except the following:
>
> "(a) liabilities against which TMW is insured or otherwise indemnified to the extent of such insurance or indemnification; * * *".

Thus, under the "Instrument of Assumption" which is the controlling agreement on this issue, Rockwell specifically excluded assumption of any liability for which Textile was insured, and it is undisputed that Textile had insurance coverage for liability of this nature. Accordingly, by virtue of the terms of the instrument of assumption, we conclude that plaintiff's assertion that Rockwell assumed this liability of Textile is without merit.

B.

Plaintiff next contends that the transaction between Rockwell and Textile amounted to a consolidation or a merger. Under Pennsylvania law, as set forth in *Freeman v. Hiznay*, 349 Pa. 89 (1944), a merger occurs where one of the two combining corporations continues in existence and absorbs the other, while a consolidation occurs where all of the combining corporations are deemed to be dissolved and to lose their identity in a new corporate entity which takes over the properties, powers and privileges, as well as the liabilities of the constituent companies. In the instant case, the agreement and plan of reorganization manifestly does not constitute a consolidation, for a consolidation contemplates a situation where the resulting corporation is a completely new entity and the constituent corporations, as such, pass out of existence. Here, no new corporate entity was formed by the dissolution of any pre-existing corporations. Similarly, the agreement and plan of reorganization did not constitute a merger, for a merger contemplates a situation where one corporation absorbs another and remains in existence while the other is dissolved. Here, both corporations survived, although Textile changed its name to the TM Company. In this case, the transaction was basically an acquisition of assets, where paragraph two of the "Agreement and Plan of Reorganization" provides for the transfer to Rockwell of substantially all of Textile's assets, but with the specific provision that certain assets

are to be retained by Textile. Also, the agreement and instrument of assumption provide for the assumption of liability by Rockwell, with certain specified exceptions. Thus, since Textile continued its corporate existence as the TM Company and retained certain assets and liabilities, we conclude that the transaction did not constitute a merger, and plaintiff's contention to the contrary is without merit. See *Kloberdanz v. Joy Mfg. Co.*, 228 F. Supp. 817, 821 (D. Col. 1968).

C.

Finally, plaintiff argues that the purchasing corporation is a mere continuation of the selling corporation. While business continues as usual in the former Textile plant, the TM Company continued in existence after the sale and there is no common identity between the officers and directors of the two corporations. See *Kloberdanz v. Joy Mfg. Co., supra.* We, therefore, conclude that this exception is inapplicable.

Since none of the four exceptions are applicable to the facts of this case, Rockwell is not liable for the debts and liabilities of Textile, which have not been assumed by it, merely by virtue of its purchase of Textile's assets. Accordingly, we granted Rockwell's motion for summary judgment and for the same reasons, we must deny plaintiff's motion for reconsideration.

ORDER

AND NOW, this 21st day of November, 1973, IT IS ORDERED that plaintiff's motion for reconsideration of the order dated September 6, 1973, is DENIED.

E. MAC TROUTMAN

J.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

(Caption Omitted in Printing)

APPELLANT'S ANSWER TO APPELLEE'S MOTION TO DISMISS APPEAL

Appellant, Stanley Knapp, Jr., by his attorneys, Messrs. Freedman, Borowsky and Lorry, hereby answers appellee's Motion to Dismiss the Appeal taken by the appellant, and in answer to the Motion says:

1. Admitted. It is admitted that this is an action for personal injuries which occurred on October 4, 1969.

2. Admitted and denied. It is admitted that on June 18, 1973, defendant filed a Motion for Summary Judgment and that the Motion was granted on September 5, 1973; however, the judgment was not entered by the Clerk on the Docket until September 6, 1973. See attached Exhibits "A" and "B".

3. Admitted and denied. It is admitted that plaintiff's Motion for Rehearing and Reconsideration was filed with the Court on October 11, 1973, and it is admitted that on November 21, 1973, Judge Troutman signed the Order, which was entered by the Clerk on the Docket on November 27th. However, the Motion for Rehearing and Reconsideration was served on the parties by mailing the Motion to them on October 5, 1973.

4. Admitted and denied. It is admitted that on December 14, 1973, appellant filed a Notice of Appeal to this Court in this case; although the Notice of Appeal states that the Appeal is from the Order of Judge Troutman of November 21, 1973, denying the Motion for Rehearing and Reconsideration, the Appeal addresses itself to the appealable Order of Judge Troutman, i.e., granting the Motion for Summary Judgment, which was entered on the Docket on September 6, 1973.

5. Admitted. It is admitted that the final judgment appealed from is the Order signed by Judge Troutman on September 5, 1973, and entered on the Docket on September 6, 1973, granting summary judgment to the defendant.

6. Admitted. It is conceded that plaintiff has no right to appeal from a denial of a Motion for Rehearing and Reconsideration; plaintiff is appealing from the dismissal of the case.

7. Denied. It is denied that plaintiff's Motion for Rehearing and Reconsideration was untimely.

8. Denied. It is denied that the Federal Rules of Civil Procedure, considering the applicable case law, forbids the enlargement of the time for filing a Motion for Rehearing and Reconsideration.

9. Denied. It is denied that appellant's Motion for Rehearing and Reconsideration was untimely. To the contrary, appellant's Motion was timely and suspended the thirty-day appeal period until the Motion was decided.

10. Admitted and denied. It is admitted that Rule 4 of the Federal Rules of Appellate Procedure tolls the thirty-day time limit to file a Notice of Appeal. It is denied that the appellant's Motion was improper or late.

11. Denied. It is denied that the Court of Appeals does not have jurisdiction in this matter.

WHEREFORE, appellant requests that appellee's Motion to Dismiss Appeal be dismissed.

FREEDMAN, BOROWSKY AND LORRY

By

Howard J. Creskoff
Attorneys for Plaintiff

(Affidavit of Howard Creskoff and Affidavit of Service of Anna M. Eisele Omitted in Printing.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

(Caption Omitted in Printing)

MEMORANDUM OF LAW CONTRA APPELLEE'S MOTION TO DISMISS APPEAL

Facts

On October 4, 1973, plaintiff's hand was caught in improperly guarded machinery, and he was seriously injured; suit was started on March 22, 1971.

On June 18, 1973, defendant filed a Motion for Summary Judgment. The Order granting the judgment was signed on September 5, 1973 by the Honorable E. Mac Troutman (see attached Exhibit "A"), entered on the docket on September 6, 1973, with copies mailed to counsel on that same date. See attached Exhibit "B". Plaintiff prepared a Motion for Reconsideration and Rehearing, which was due on September 17th (the Order was docketed on September 6th, September 16th was a Sunday and, therefore, the Motion was due the next day, September 17th). The morning that the Motion was due, a call was received from the chambers of Judge Troutman stating the case was Number 3 in the trial pool. The matter was discussed with the Judge's clerk, the clerk discussed the matter with the Judge, and it was agreed that until counsel were advised whether the case was going to be tried or whether the Motion for Summary Judgment had been granted dismissing the case, the time period for filing the petition for reconsideration would be enlarged. See Exhibit "C".

Plaintiff's Motion for Reconsideration and Rehearing was docketed on October 11, 1973, but had been served on counsel by mailing it to them on October 5, 1973.

Judge Troutman signed an Order denying the Motion for Reconsideration and Rehearing on November 21, 1973, and that Order was docketed on November 27, 1973.

On December 14, 1973, appellant filed a Notice of Appeal to this Court, appealing the Order of November 21, 1973, which refers to the Order docketed September 6, 1973.

The appeal of the plaintiff was filed timely, and the defendant's Motion to Dismiss should, itself, be dismissed.

Argument

Defendant's Motion to Dismiss addresses itself to three problems, and asks that plaintiff's Appeal be dismissed as it was not filed on time.

1. That denial of a Motion for Rehearing is not appealable.

2. A Motion for Rehearing and Reconsideration is considered a Motion under Rule 59 (e) F.R.C.P. for purposes of tolling the time for appeal.

3. A Rule 59 (e) Motion does not toll the appeal period unless timely filed.

It is agreed that the denial of a Motion for Rehearing and Reconsideration is not appealable. The original Order is what is appealable, no matter what the Appeal is called or styled. *Gainey v. Brotherhood of Railway & Steamship Clerks, Etc.*, 303 F.2d 716 (3rd Cir. 1962).

It is also agreed that a Motion for Rehearing and Reconsideration is a Rule 59 (e) Motion (or a Rule 60 Motion). *Gainey v. Brotherhood of Railway & Steamship Clerks, Etc.*, supra.

What must be decided, then, is whether the plaintiff's Motion for Rehearing and Reconsideration was timely, for if it was, then the Appeal to this Court was timely.

Rule 58 of the Federal Rules of Civil Procedure gears an appeal to the entry of the judgment in the docket; before a judgment becomes effective, it must be entered in the docket, and the appeal period does not begin to run until it is entered in the docket. *Levin v. Wearever Aluminum, Inc.*, 427 F. 2d 847 (3rd Cir. 1970).

A Motion for Rehearing and Reconsideration must be served within ten days of the entry of an Order in the docket. Rules 6, 58, 59 (e), Federal Rules of Civil Procedure; local rule 37.

The Order of Judge Troutman was docketed on September 6, 1973, and the ten-day service period began to run, in accordance with Rule 6, F.R.C.P., the day after, or September 7th. The ten-day service period expired on September 16th, but since that was a Sunday, in accordance with Rule 6, F.R.C.P., that day did not count, and the last day then became September 17, 1973.

On September 17th, the day of Motion was to be served, the Court called to say the case was Number 3 in the trial pool. See attached Exhibit "C".

The Judge's Clerk, after discussing the matter with the Judge, advised counsel for the plaintiff that the Petition for Reconsideration filing time would be enlarged until the Judge decided whether or not the case was actually Number 3 in the pool and ready for trial, or dismissed pursuant to defendant's Motion for Summary Judgment. When word was conveyed to plaintiff's counsel that the Motion for Summary Judgment had been granted, the Motion for Rehearing and Reconsideration was served on the defendant by mail on October 5, 1973.

The service was in accordance with Rule 5(b) and 5(d) F.R.C.P. and Local Rule 36, and the Motion was filed with the Clerk on October 11, 1973.

The Motion was accepted by the Court, the Court requested a reply brief from the defendant, which was complied with, reconsidered the matter, signed an Order dismissing the Motion, drafted a Memorandum Opinion (dated November 21, 1973), which was docketed on November 27, 1973. Plaintiff appealed to this Court on December 14, 1973, from the Order denying reconsideration and rehearing, which is actually an appeal from the Order dismissing the case. *Gainey v. Brotherhood Railway & Steamship Clerks, Etc.*, supra.

The problem is then whether the Motion for Rehearing was filed timely. The answer is yes. The Motion for Rehearing was served after the ten-day period in reliance on the District Court's enlargement of the service period.

Normally, an untimely Motion for Reconsideration is a nullity and does not toll the time in which to appeal.

MacNeil Bros. Co. v. Cohen, 264 F.2d 190, 193 (1st Cir. 1959) "The only exception to this general proposition has been fashioned to cover situations in which the movant has been induced to forego filing his notice of appeal within thirty days by some action by the District Court indicating that the post-judgment motion was timely filed, when in fact it was not." *United States v. Merrick*, 464 F.2d 1087 (1st Cir. 1972). For the same holding, see *Wolfsohn v. Hankin*, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964), rev'g. 116 U.S.App. D.C. 127, 321 F.2d 393 (1963); *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964); *Harris v. Cherry Meatpackers, Inc.*, 371 U.S. 215, 9 L.Ed. 2d 261, 83 S.Ct. 283 (1962).

Conclusion

In accordance with *Harris v. Cherry Meatpackers, Inc.*, supra, *Thompson v. Immigration Service*, supra, and *Wolfsohn v. Hankin*, supra, the filing of the Appeal was timely, fits squarely within the letter and spirit of the Supreme Court decisions on this very issue, and a hearing on the merits should be permitted.

Respectfully submitted,

FREEDMAN, BOROWSKY AND LORRY

By

Howard J. Creskoff
Attorneys for Plaintiff

(Exhibit "A to Memorandum of Law is already printed at page 7a.)

Exhibit "B"

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Judge Troutman, Presiding
Cause No. 71-668

Date: September 6, 1973

Title of Cause

STANLEY KNAPP

v.

NORTH AMERICAN ROCKWELL CORP. ET AL

Brief Statement of Proceedings

Counsel is required to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below. (Separate lists may be appended).

Names and addresses of moving counsel

Howard Creskoff Esq.
8th Fl. Lafayette Bldg.,
Phila., Pa. 19106

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent

Post & Schell
Suite 717, 2 Penn Center Plaza
Phila., Pa. 19102

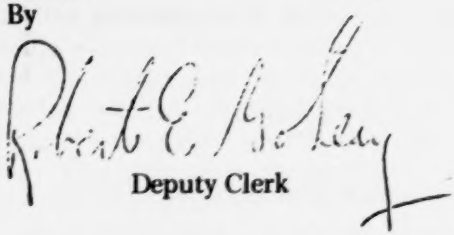
John Day Esq.
1724 PNB Bldg., Phila. Pa. 19107

Reserve space below for notations, Orders or Judgments to be entered by the Judge or the Court Room Deputy.

In accordance with Order this day filed, judgment is entered in favor of defendant, North American Rockwell Corp. and against plaintiff, Stanley Knapp with costs.

Attest: OR BY THE COURT:

By



Deputy Clerk Judge

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court
until cause has been called.

Exhibit "C"

FREEDMAN, BOROWSKY AND LORRY

Counsellors at Law and Proctors in Admiralty

(Letterhead Omitted in Printing.)

September 17, 1973

Honorable E. Mac Troutman
5004 U. S. Court House
9th and Chestnut Streets
Philadelphia, Pa. 19107

Re: Knapp vs. North American Rockwell Corp. et al.
Civil Action No. 71-688

Dear Judge Troutman:

Defendant's Motion for Summary Judgment was recently granted in this matter.

A Petition for Reconsideration is being prepared and will be filed shortly.

Today your chambers called to advise that the case is No. 3 in the pool. I trust that the time for filing the Petition for Reconsideration will be enlarged pending word from your office as to whether or not the Summary Judgment was granted against me.

Respectfully yours,
/s/
Howard J. Creskoff

HJC:ame

cc: Barton L. Post, Esq.
John Day, Esq.

LAFAYETTE BUILDING, EIGHTH FLOOR
CHESTNUT STREET AT FIFTH, PHILADELPHIA, PA. 19106
WALNUT 5-8400
NEW YORK OFFICE • 36 SEVENTH AVENUE • OREGON 5-4211

Exhibit "D"

FREEDMAN, BOROWSKY AND LORRY
Counsellors at Law and Proctors in Admiralty

(Letterhead Omitted in Printing.)

January 30, 1974

Robert M. Britton, Esquire
Suite 1401
2 Penn Center Plaza
Philadelphia, Pa. 19102

Re: Knapp v. North American Rockwell Corp. et al
Your file No. 3597 BB

Dear Mr. Britton:

Enclosed is a copy of appellant's Answer to Appellee's Motion to Dismiss Appeal and Memorandum of Law Contra Appellee's Motion to Dismiss Appeal, the original of which has been filed this day with the Court.

Very truly yours,

FREEDMAN, BOROWSKY AND LORRY

By
Howard J. Creskoff

HJC:ame
Encl.

cc: John Day, Esquire, w/encl.

LAFAYETTE BUILDING, EIGHTH FLOOR
CHESTNUT STREET AT FIFTH, PHILADELPHIA, PA. 19106
WALNUT 5-8400
NEW YORK OFFICE • 36 SEVENTH AVENUE • OREGON 5-4211

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1110

STANLEY KNAPP, JR., *Appellant*

v.

NORTH AMERICAN ROCKWELL CORPORATION

v.

MRS. SMITH's PIE CO.,
(3rd-party defendant)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. C. Civil No. 71-668

Argued September 10, 1974
Before: ALDISERT, ADAMS and ROSENN, *Circuit Judges*

HOWARD J. CRESKOFF
FREEDMAN, BOROWSKY AND LORRY
Philadelphia, Pa. 19106
Attorneys for Appellant

ROBERT M. BRITTON
BARTON L. POST
POST & SCHELL, P.A.
Philadelphia, Pa. 19102
Attorneys for Appellee

OPINION OF THE COURT

(Filed December 27, 1974)

ADAMS, *Circuit Judge*

The principal question here is whether it was error to grant summary judgment on the ground that one injured by a defective machine may not recover from the corporation that had purchased substantially all the assets of the manufacturer of the machine because the transaction had been a sale of assets rather than a merger or consolidation.

I.

Stanley Knapp, Jr., an employee of Mrs. Smith's Pie Co., was injured on October 6, 1969, when, in the course of his employment, his hand was caught in a machine known as a "Packomatic." The machine had been designed and manufactured by Textile Machine Works (TMW) and had been sold to Mrs. Smith's Pie Co. in 1966 or 1967.

On April 5, 1968, TMW entered into an agreement with North American Rockwell whereby TMW exchanged substantially all its assets for stock in Rockwell. TMW retained only its corporate seal, its articles of incorporation, its minute books and other corporate records, and $500,000 in cash intended to cover TMW's expenses in connection with the transfer.[1] TMW also had the right, prior to closing the transaction with Rockwell, to dispose of land held by TMW or its subsidiary. Among the assets acquired by Rockwell was the right to use the name "Textile Machine Works."[2] TMW was to change its name on the closing

1. Any of the $500,000. remaining at the time of the dissolution of the Textile Machine Corporation was to be returned to Rockwell.

2. In this opinion, "Textile Machine Works" and "TMW" refer only to the corporation which agreed to sell its assets to Rockwell and then to dissolve.

date, then to distribute the Rockwell stock to its shareholders and to dissolve TMW "[a]s soon as practicable after the last of such distributions."

The accord reached by Rockwell and TMW also stipulated that Rockwell would assume specified obligations and liabilities of TMW, but among the liabilities not assumed were: "(a) liabilities against which TMW is insured or otherwise indemnified to the extent of such insurance or indemnification unless the insurer or indemnitor agrees in writing to insure and indemnify [Rockwell] to the same extent as it was so insuring and indemnifying TMW."

Closing took place pursuant to the agreement on August 29, 1968. Plaintiff sustained his injuries on October 6, 1969. TMW was dissolved on February 20, 1970, almost 18 months after the bulk of its assets had been exchanged for Rockwell stock.

Plaintiff filed this suit against Rockwell in the district court on March 22, 1971. He alleged that his injuries resulted from the negligence of TMW in designing and manufacturing the machine and that Rockwell, as TMW's successor, is liable for such injuries. Rockwell joined plaintiff's employer, Mrs. Smith's Pie Co., as a third-party defendant.[3]

In the district court suit, Rockwell moved for summary judgment on June 19, 1973. On September 6, 1973, the district court granted the motion, ruling that Rockwell had neither merged nor consolidated with TMW, that Rockwell was not a continuation of TMW, and that Rockwell had not assumed TMW's liability to Knapp. Therefore, the court concluded, Rockwell was not responsible for the obligations of TMW. On October 11, 1973, Knapp filed a motion for

3. On July 13, 1972, after Rockwell had denied responsibility for any liability TMW may have had to Knapp, Knapp sued TMW in a Pennsylvania state court to recover for his injuries. That suit was barred, however, either by the two year statute of limitations on personal injury actions [12 Pa. Stat. Ann. §31] or by the statute requiring that suits against a dissolved corporation be commenced within two years of the date of dissolution [15 Pa. Stat. Ann. §2111 (Supp. 1974)].

rehearing and reconsideration by the district court, which was denied on November 26, 1973. Knapp appealed to this Court on December 11, 1973.[4]

II.

Both parties agree that this case is controlled by the following principle of law:

> The general rule is that "a mere sale of corporate property by one company to another does not make the purchaser liable for the liabilities of the seller not assumed by it." . . . There are, however, certain exceptions to this rule. Liability for obligations of a selling corporation may be imposed on the purchasing corporation when (1) the purchaser expressly or impliedly agrees to assume such obligations; (2) the transaction amounts to a consolidation or merger of the selling corporation with or into the purchasing corporation; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape liability for such obligations.

Shane v. Hobman, Inc., 332 F. Supp. 526, 527-28 (E.D. Pa. 1971) (citations omitted) (decided under New York law).

In light of this language, Knapp contends that the transaction in question "amounts to a consolidation or merger of [TMW] with or into the purchasing corporation [Rockwell]" or, alternatively, that Rockwell is a "continuation" of TMW. Although the TMW corporation technically continued to exist until its dissolution approximately 18 months after the consummation of the transaction with Rockwell, TMW was, Knapp argues, a mere shell

4. Rockwell moved to dismiss the appeal, alleging that the notice of appeal was not timely filed. Since another panel of this Court denied the motion to dismiss the appeal on February 27, 1974, this panel may not review that decision.

during that period. It had none of its former assets, no active operations, and was required by the contract with Rockwell to dissolve itself "as soon as practicable." Knapp urges in effect that the transaction between TMW and Rockwell should be considered a de facto merger.[5]

Rockwell asserts, in defense of the district court's grant of summary judgment, that a merger, a consolidation and a continuation all require that the corporation being merged, consolidated or continued cease to exist. TMW, Rockwell claims, did not go out of existence at the time of the exchange with Rockwell, but continued its corporate life for 18 months thereafter. Further, Rockwell argues, TMW until its dissolution possessed assets of substantial value, in the form of Rockwell stock.[6]

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5. In addition, Knapp asserts that the district court erred in granting the defendant's motion for summary judgment because there remains a material issue of fact relating to whether Rockwell expressly assumed any liability TMW may have to Knapp. The agreement between TMW and Rockwell stated that Rockwell would not assume those liabilities of TMW for which TMW was insured "unless the insurer or indemitor agrees in writing to insure and indemnify [Rockwell] to the same extent it was so insuring and indemnifying TMW." On the basis of the record before the district court, there was, according to Knapp, a material issue of fact remaining, since there had been no showing that the relevant insurer had not agreed to so protect Rockwell.

6. As to Knapp's contention regarding the assumption of TMW's liabilities, Rockwell claims there was no material issue of fact relating to that issue. The operative document with respect to the assumption of TMW's obligations, Rockwell contends, is not the agreement of sale dated April 5, 1968, but the instrument executed by Rockwell August 29, 1968, which stipulates that Rockwell "hereby assumes and agrees to pay" all debts of TMW except "(a) liabilities against which TMW is insured or otherwise indemnified to the extent of such insurance or indemnification," without further qualifications. Therefore, in Rockwell's view, it is clear Rockwell has not assumed the liability to Knapp. Furthermore, counsel for Rockwell has submitted to this Court with his brief an affidavit of the Assistant General Counsel of Rockwell averring that no liability insurance policies were transferred from TMW to Rockwell and no insurance company has agreed to indemnify Rockwell as it had previously insured TMW.

III.

In a diversity case, the federal court must apply the rules of law which would govern if suit were brought in a court of the forum state.[7] We must, therefore, determine how this case would be decided by a Pennsylvania court.

All jurisdictions which have considered the question appear to have accepted not only the general rule that a corporation which purchases the assets of a second corporation is not thereby liable for the obligations of the selling corporation, unless there exists one of the exceptions set out in *Shane, supra* p. 5.[8]

Under *Shane*, the first of the four exceptions rendering the purchasing corporation liable for duties of the seller is a transaction amounting to a merger or consolidation. In a merger a corporation absorbs one or more other corporations, which thereby lose their corporate identity. "A merger of two corporations contemplates that one will be absorbed by the other and go out of existence, but the absorbing corporation will remain."[9] In a consolidation,

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7. Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).

8. *See, e.g.*, Forest Laboratories v. Pillsbury Co., 452 F.2d 621 (7th Cir. 1971); West Texas Refining & Dev. Co. v. Commissioner, 68 F.2d 77 (10th Cir. 1933); Bazan v. Kux Mach. Co., 358 F. Supp. 1250 (E.D. Wis. 1973); Shane v. Hobam, Inc., 332 F. Supp. 526 (E.D. Pa. 1971) (decided under New York law); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968); Copease Mfg. Co. v. Cormac Photocopy Corp., 242 F. Supp. 993 (S.D. N.Y. 1965); J. F. Anderson Lumber Co. v. Myers, 206 N.W.2d 365 (Minn. 1973); McKee v. Harris-Seybold Co., 109 N.J. Super. 555 (L. Div. 1970) aff'd per curiam 288 A.2d 585 (1972); Comstock v. Great Lakes Distributing Co., 209 Kan. 306, 496 P.2d 1308 (1972); Schwartz v. McGraw-Edison Co., 14 Cal. App.3d 767, 92 Cal. Rptr. 776 (1971); Lamb v. Leroy Corp., 454 P.2d 24 (Nev. 1969); Buis v. Peabody Coal Co., 41 Ill. App.2d 317, 190 N.E.2d 507 (1963).

9. Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 159 A.2d 146, 151 (Ch. 1960) aff'd per curiam 33 N.J. 72, 161 A.2d 474 (1960). *Accord* Freeman v. Hiznay, 349 Pa. 89 (1944); 15 W. Fletcher, Cyclopedia of the Law of Private Corporations §§7040-41 (1973).

on the other hand, "all the combining corporations are deemed to be dissolved and to lose their identity in a new corporate entity which takes over all the properties, powers and privileges, as well as the liabilities, of the constituent companies."[10] Another of the *Shane* exceptions to the general rule of nonliability arises when there is a continuation. In a continuation, a new corporation is formed to acquire the assets of an extant corporation, which then ceases to exist. "[T]here is in effect but one corporation which merely changes its form and ordinarily ceases to exist upon the creation of the new corporation which is its successor."[11]

No prior cases decided under Pennsylvania law have addressed the problem presently before this Court. However, when courts from other jurisdictions have considered similar questions, they have ascertained the existence *vel non* of a merger, a consolidation or a continuation on the basis of whether, immediately after the transaction, the selling corporation continued to exist as a corporate entity and whether, after the transaction, the selling corporation possessed substantial assets with which to satisfy the demands of its creditors.

Thus, in *Bazan v. Kux Machine Co.*,[12] the plaintiff was injured in 1966 by a machine purchased by his employer from Kux Machine Co. in 1961. In 1963, after the sale of the machine to plaintiff's employer but prior to the accident, Kux sold to the Wickes Corporation the bulk of Kux's assets, retaining only its accounts receivable, its prepaid insurance and its real estate. Wickes acquired Kux' tangible personal property, licenses, trademarks, patents, good will, and the exclusive right to use the name "Kux Machine." Kux, after changing its name, remained in ex-

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10. *Freeman, supra* at 94. *Accord* Applestein, *supra;* 15 Fletcher, *supra* §§7040-41.

11. *Fletcher, supra,* §§7205. *See* Forest Laboratories v. Pillsbury Co., 452 F.2d 621, 626 (7th Cir. 1971); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817, 821 (D. Colo. 1968).

12. 358 F. Supp. 1250 (E.D. Wis. 1973).

istence for ten months before dissolving as required by the contract with Wickes. The court held that the transaction was not a merger, consolidation or continuation. It reasoned that Kux continued to exist for a substantial period after the exchange, that the transaction was a cash sale rather than an exchange of stock, and that none of the owners or management of the seller acquired any interest in the buyer.

Similarly, in *McKee v. Harris-Seybold Co.*,[13] the court held that there had been no merger or consolidation between the alleged tortfeasor and the purchaser of its assets. The plaintiff was injured in 1968 by a paper-cutting machine manufactured in 1916 by the Seybold Machine Co. In 1926, Seybold agreed to sell its assets to Harris Automatic Press Co. In exchange, Harris agreed to give Seybold cash plus common stock in Harris, and to assume certain of Seybold's liabilities. Harris acquired all the assets of Seybold including its good will and the exclusive use of the name "Seybold Machine Co." Seybold agreed to change its name and not to engage in any manufacturing activities. Seybold continued to exist under a different name for one year after the exchange. Prior to the consummation of the transaction Harris assigned its interest in the contract to a new corporation formed for the purpose. The new corporation was later renamed the Harris-Seybold Co. The court held that Harris-Seybold was not liable for the plaintiff's injuries because there had been no merger or consolidation between the Harris and Seybold corporations. Nor, the court ruled, was Harris or Harris-Seybold a continuation of Seybold. After observing that this was not an exchange for securities alone, the court stressed that "[t]he identity of the [Seybold] corporation and of its stockholders as an integral part of the corporate identity was not eradicated by the transfer." 264 A.2d at 104. The court set forth its rationale in the following passage:

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13. 109 N.J. Super. 555 (L. Div. 1970) *aff'd per curiam*, 288 A.2d 585 (1972).

> The corporation could no longer function as a manufacturer, yet it could and did operate as a corporation for some time after the sale. The vendor corporation, as a corporate entity, was not absorbed into the purchasing corporation. What was absorbed was the nature of the manufacturing operations previously engaged in by Seybold, not the corporate entity itself. *Id.*

The court's analysis was that "[i]f the vendor corporation receives the consideration for the transfer as opposed to those situations where the stockholders directly receive the same, and that corporation is thereby kept alive, there seems to be nothing in the nature of a merger or consolidation." *Id.*

The Nevada Supreme Court reached the same conclusion in *Lamb v. Leroy Corp.*[14] There, a contract creditor of Nevada Land and Mortgage Co. sought to enforce his claim against the Leroy Corp. Shares in Leroy were exchanged in 1965 for all the assets of Nevada Land exclusive of two items of real estate Leroy did not want and some incidental cash. A certificate representing the stock was delivered to Nevada Land. "Soon after the consummation of [the] transaction,"[15] Nevada Land distributed the Leroy shares to its shareholders and dissolved, without satisfying Lamb's claim. The court concluded that the transaction was not a merger or a consolidation, on the basis that the consideration was adequate, that Leroy delivered the shares to Nevada Land rather than to its shareholders, and that the subsequent dissolution was a separate transaction.

This cluster of cases[16] illustrates the significance

14. 85 Nev. 276, 454 P.2d 24 (Nev. 1969).

15. The opinion gives no more precise statement of the time.

16. *See also*, Forest Laboratories v. Pillsbury Co., 452 F.2d 621 (7th Cir. 1971); West Texas Refining & Dev. Co. v. Commissioner, 68 F.2d 77 (10th Cir. 1933); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968); Copease Mfg. Co. v. Cormac Photocopy Corp., 242 F. Supp. 993 (S.D. N.Y. 1965); J. F. Anderson Lumber Co. v. Myers, 206 N.W.2d 365 (Minn. 1973); Schwartz v. McGraw-Edison Co., 14 Cal. 3d App. 767, 92 Cal. Rptr. 776 (1971); Buis v. Peabody Coal Co., 411 Ill. App.2d 317, 190 N.E.2d 507 (1963).

which the decisions from other jurisdictions accord to corporate theory and the continued existence of the corporate entity. The adequacy of the consideration received by the selling corporation has also been given great weight in deciding the existence of a sale as contrasted with a merger or continuation. In *Lamb, supra,* the court pointed out that the consideration was adequate, since the selling corporation received a valuable asset—the purchaser's stock—which for the remainder of the life of the corporation was exposed to the claims of the seller's creditors. Similarly, the court emphasized in *McKee, supra,* that the selling corporation had received substantial value for its assets, and that there was no hint the selling corporation was being denuded of assets with which it might satisfy the claims of creditors. The district court for the District of Colorado, in *Kloberdanz v. Joy Mfg. Co.,* [17] stated that "the emphasis should be on whether the sale was a bona fide one involving the payment of money or property to the selling corporation whereby it can respond in damages in actions like the present one."

In *Jackson v. Diamond T. Trucking Co.,*[18] the court found the purchasing corporation to be a continuation of the selling corporation because the "purchaser" took all the assets of the "seller" in return for nominal consideration only. Similarly, in *Ruedy v. Toledo Factories Co.*[19] and *Hoche Productions v. Jayark Films Corp.,*[20] the courts concluded that the transactions were mergers after the "selling" corporations were left without appreciable assets to satisfy the claims of their creditors.

IV.

The cases discussed above, all decided under the law of jurisdictions other than Pennsylvania, may suggest that the arrangement between Rockwell and TMW should be

17. 288 F. Supp. 817, 820 (D. Colo. 1968).
18. 100 N.J. Super. 186, 241 A.2d 471 (L. Div. 1968).
19. 61 Ohio App. 21, 22 N.E.2d 293 (1939).
20. 256 F. Supp. 291 (S.D. N.Y. 1966).

considered a sale rather than a merger or a continuation, since TMW did not officially terminate its corporate existence for 18 months after the exchange, and throughout that period possessed valuable assets with which to respond to tort claims similar to the one now advanced. However, a number of considerations indicate the insubstantiality of the continued existence of TMW, including the brevity of the corporation's continued life, the contractual requirement that TMW be dissolved as soon as possible, the prohibition on engaging in normal business transactions, and the character of the assets TMW controlled. Although each of these factors was present in one or more of the above cases, the present appeal is unique in combining all these elements. In addition, the better-reasoned result would be to conclude that, for the purpose of determining liability to tortiously injured parties, the Rockwell-TMW transaction should be treated as a merger, thereby subjecting Rockwell to liability for injuries caused by defective products distributed by TMW prior to the transaction.

We must, of course, apply the rule of law we believe a Pennsylvania appellate tribunal would adopt if the case arose in the state courts. In resolving issues relating to the recognition of a cause of action in favor of an injured party, the Pennsylvania courts have emphasized the public policy considerations served by imposing liability on the defendant rather than formal or technical requirements.[21]

The Pennsylvania Supreme Court has held, in the context of the rights of dissenting shareholders, that if an agreement between two corporations bears the essential

21. Some indication of the probable reaction of the Pennsylvania Supreme Court to the issue posed by this case may perhaps be gleaned from that Court's discussion in Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968), and Salvador v. Atlantic Steel Boiler Company, — Pa. —, 319 A.2d 903 (1974). Although the issues presented in *Kassab* and *Salvador* turned on the doctrine of privity, which is not present here, the reasoning utilized by the Supreme Court in those cases dealt with the economic reality of the relationship between manufacturers and the users of the allegedly defective products.

character of a merger, the failure of the contracting parties to follow the statutory merger procedures should not deprive third parties of relief otherwise available to them. By Pennsylvania statute, when two corporations are merged, the surviving corporation becomes liable for the obligations of the corporation which ceases to exist.[22] Also, any shareholder of a merging corporation who is dissatisfied with the merger plan may obtain a valuation of his shares.[23]

In *Farris v. Glen Alden Corp.*,[24] a shareholder of Glen Alden sought to enjoin a meeting of Glen Alden shareholders called to approve a "reorganization agreement" with List Industries. Plaintiff asked that the meeting be enjoined because management had failed to inform the shareholders that the purpose of the meeting was the approval of a merger and that the shareholders had a right to dissent from the merger and obtain a valuation of their stock. Management responded that the shareholders had no valuation rights because the transaction did not conform to the statutory merger procedures and therefore was not a merger, but a sale of assets to which valuation rights did not apply. Pursuant to the plan of reorganization, Glen Alden was to acquire all the assets of List except a small amount of cash reserved for payment of expenses in connection with the transaction. In exchange, Glen Alden was to assume all List's liabilities and to issue stock to List that List would distribute to its stockholders. List was then to dissolve and Glen Alden to change its name to List Alden.

The Court expressed the view in *Farris* that because of the complexities of modern corporate reorganizations,

> it is no longer helpful to consider an individual transaction in the abstract and solely by reference to the various elements therein determine whether it is a "merger" or a "sale." Instead, to determine properly

22. 15 Pa. Stat. Ann. §1907 (1967).
23. 15 Pa. Stat. Ann. §1908 (1967).
24. 393 Pa. 427, 143 A.2d 25 (1958).

> the nature of a corporate transaction, we must refer not only to all the provisions of the agreement, but also to the consequences of the transaction and to the purpose of the provisions of the corporation law said to be applicable.[25]

The rationale of dissenting shareholders' rights, the Court stated, is to allow shareholders to treat their membership in the original corporation as terminated when the corporation, in combining with another, "lose[s] its original nature." The List-Glen Alden agreement, the Court held, fundamentally altered the relationship between Glen Alden and its shareholders, and therefore the provisions relating to dissenting shareholders' rights should apply.[26]

The present case, like *Farris*, involves a transaction which resembles a merger but does not possess all the formal characteristics of one. It seems appropriate to infer from *Farris* that in deciding whether to treat such an arrangement as a merger the Pennsylvania courts would consider the purposes which would be served by imposing liability on Rockwell for the tortious conduct of TMW.[27]

In the present case, Knapp is confronted with the melancholy prospect of being barred from his day in court[28]

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25. 143 A.2d at 28.

26. *See also*, Troupiansky v. Henry Disston & Sons, 151 F. Supp. 609 (E.D. Pa. 1957); Marks v. Autocar Co., 153 F. Supp. 768 (E.D. Pa. 1954); Bloch v. Baldwin Locomotive Works, 75 Pa. 24 D. & C. 24 (C. P. Del. Co. 1950).

In *Glen Alden*, the Court stated in dictum that even if the exchange were a sale, another statutory provision would give dissenting shareholders valuation rights. 143 A.2d at 31.

27. Although the facts of the present case are admittedly a step beyond those in *Farris*, in view of the legislative intent deduced by the Pennsylvania courts in the field of dissenting shareholders' rights, it might be contended that the Pennsylvania Supreme Court would find that the legislature intended to permit tort liability in cases like the one sub judice.

28. Knapp might be able to recover a limited amount by way of a workmen's compensation claim. However, nothing in the record here sheds any light on such possibility.

unless Rockwell is held subject to suit. And quite significantly, if Knapp had been injured more than two years after the dissolution of TMW, Knapp would never have had any opportunity to recover at law, since under Pennsylvania law a dissolved corporation is subject to suit for only two years after the date of dissolution.[29]

Denying Knapp the right to sue Rockwell because of the barren continuation of TMW after the exchange with Rockwell would allow a formality to defeat Knapp's recovery. Although TMW technically existed as an independent corporation, it had no substance. The parties clearly contemplated that TMW would terminate its existence as a part of the transaction. TMW had, in exchange for Rockwell stock, disposed of all the assets it originally held,[30] exclusive of the cash necessary to consummate the transaction. It could not undertake any active operations. Nor was TMW permitted under the agreement to divest itself of the Rockwell stock, so that it might become an effective investment vehicle for its shareholders.[31] Most significantly, TMW was required by the contract with Rockwell to dissolve "as soon as practicable."

On the other hand, Rockwell acquired all the assets of TMW, exclusive of certain real estate that Rockwell did not want, and assumed practically all of TMW's liabilities. Further, Rockwell required that TMW use its "best efforts," prior to the consummation of the transaction, to preserve TMW's business organization intact for Rockwell, to make available to Rockwell TMW's existing officers and employees, and to maintain TMW's relationship with its cus-

29. Pa. Stat. Ann. §2111 (Supp. 1974).

30. The contract with Rockwell provided that "TMW shall have the right to dispose of, prior to closing," real estate interests held by TMW or its subsidiary. By the terms of the contract, if TMW failed to dispose of these assets prior to closing, they would be transferred to Rockwell.

31. It is an indication of the true nature of the transaction that, although Rockwell delivered its stock to TMW, the reorganization agreement required letters of investment intent from TMW's controlling shareholders, rather than from TMW.

tomers and suppliers. After the exchange Rockwell continued TMW's former business operations.

If we are to follow the philosophy of the Pennsylvania courts that questions of an injured party's right to seek recovery are to be resolved by an analysis of public policy considerations rather than by a mere procrustean application of formalities, we must, in considering whether the TMW-Rockwell exchange was a merger, evaluate the public policy implications of that determination.

In resolving where the burden of a loss should be imposed, the Pennsylvania Supreme Court has considered which of the two parties is better able to spread the loss. In *Ayala v. Philadelphia Board of Education*,[32] a student who had been injured by a shredding machine during an upholstery class sued the Board of Education. The Court, in abolishing the doctrine of immunity in suits against local government, observed that the Board was in a better position than the student to have avoided the injury, and that "[T]he city is a far better loss-distributing agency than the innocent and injured victim."[33] The Court, quoting the Supreme Court of Illinois, decried the injustice of imposing upon an injured party the entire burden of his injuries, rather than distributing the responsibility throughout the community "where it could be borne without hardship upon any individual."[34]

The Pennsylvania courts have also noted the importance of insurance in performing the loss-spreading function. In *Falco v. Pados*, the Court concluded that public interest mandated the abolition of parental immunity from liability for a parent's negligent injury to his child because, in the presence of wide-spread liability insurance coverage, the doctrine of parental immunity unjustly confined the burden of the loss to the injured party alone. "In a time of almost universal liability insurance, such unexpected hard-

32. 453 Pa. 584, 305 A.2d 877 (1973).

33. 305 A.2d at 882, *quoting* from 32 Am. Trial L.J. 284, 288 (1968).

34. 305 A.2d at 881, *quoting* Molitor v. Kaneland, Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

ship or ruin is needlessly inflicted by the immunity doctrine."[35]

Interpreting all the allegations in the light most favorable to Knapp, as we must on a motion for summary judgment, neither Knapp nor Rockwell was ever in a position to prevent the occurrence of the injury, inasmuch as neither manufactured the defective device. As between these two parties, however, Rockwell is better able to spread the burden of the loss. Prior to the exchange with Rockwell, TMW had procured insurance that would have indemnified TMW had it been held liable to Knapp for his injuries. Rockwell could have protected itself from sustaining the brunt of the loss by securing from TMW as assignment of TMW's insurance. There is no indication in the record that such an assignment would have placed a burden on either Rockwell or TMW since TMW had already purchased the insurance protection, and the insurance was of no continuing benefit to TMW after its liability to suit was terminated by Pennsylvania statute. Rockwell has adduced no explanation, either in its brief or at oral argument, why it agreed in the contract not to take an assignment of TMW's prepaid insurance. Rockwell therefore should not be permitted to impose the weight of the loss upon a user of an allegedly defective product by delaying the formal dissolution of TMW. In the absence of contrary controlling decisions by the Pennsylvania courts, we conclude that the state judiciary would adopt the rule of law that appears to be better reasoned and more consistent with the social policy set forth in recent Pennsylvania cases.[36]

The judgment of the district court will therefore be reversed and the case remanded for further proceedings consistent with this opinion.

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35. 444 Pa. 372, 282 A.2d 351 (1971), at 355.

36. Our disposition of this issue makes it unnecessary for us to decide whether there remained a material issue of fact as to whether Rockwell had expressly assumed TMW's potential liability to Knapp. In particular, we need not decide whether the affidavit of the Assistant General Counsel of Rockwell, submitted for the first time after the appeal was filed, was properly before this Court.

ROSENN, *Circuit Judge*, Concurring.

The majority holds that, under certain circumstances, a corporation which acquires substantially all the assets of another corporation may be held liable for injuries caused by defective products manufactured by the other corporation before the date of acquisition. In the present case, they conclude that, even though the transaction was structured as a sale of assets, it should be "treated as a merger" for the purpose of imposing tort liability. Although I concur in the result reached by the majority, I wish to clarify the basis upon which I would impose such liability.

Our examination should begin with the Pennsylvania Business Corporation Law which provides for merger of two or more corporations. 15 P.S. §801 *et seq*. One of the purposes of the statutory merger provisions is to protect dissenting shareholders by according them the right to have their shares redeemed by the corporation at full market value. *See* 15 P.S. §805. Another purpose is to protect persons having claims against a nonsurviving corporation. *See* 15 P.S. §803.

Section 803 provides in part that, after merger,

> all debts not of record, duties, and liabilities of each of said constituent corporations shall thenceforth attach to the said surviving . . . corporation . . . .

Thus, had Rockwell's acquisition of TMW been accomplished by merger rather than by purchase of assets, section 803 would have subjected Rockwell to liability for tort claims against TMW.

In the present day of complex corporate reorganizations and acquisitions, the intrinsic nature of a transaction cannot be ascertained merely from the form in which it is structured. Courts therefore must examine the substance of the transaction to ascertain its purpose and true intent.

> [I]t is no longer helpful to consider an individual transaction in the abstract and solely by reference to the various elements therein determine whether it is a "merger" or a "sale". Instead, to determine properly the nature of a corporate transaction, we must refer not only to all the provisions of the agreement, but also to the consequences of the transaction and to the purposes of the provisions of the corporation law said to be applicable.

Farris v. Glen Alden Corp., 393 Pa. 427, 432, 143 A.2d 25, 28 (1958).

The Pennsylvania Supreme Court has had occasion to examine the rights of dissenting shareholders when a transfer of the business operations of one corporation to another is effectuated by sale rather than by utilization of the statutory procedures provided for merger. In *Farris v. Glen Alden Corp., supra*, Glen Alden entered into an agreement to purchase all of the assets of List Industries Corporation (List) in exchange for capital stock of Glen Alden. List was to be dissolved and the operations of both corporations were to be carried on by Glen Alden, whose name was to be changed to List Alden. The directors of both corporations were to become directors of List Alden. In enforcing the appraisal rights of an objecting stockholder of Glen Alden, the court stated that, even though the combination of corporations was effectuated by a sale of assets to which the merger statute does not literally apply, "we will not blind our eyes to the realities of the transaction." 393 Pa. at 438, 143 A.2d at 31. It concluded that the combination proposed, "although consummated by contract rather than in accordance with the statutory procedure, is a merger within the protective purview . . . of the corporation law." *Id.* It reached this conclusion on the following basis:

> The rationale . . . of the present section of the Business Corporation Law . . . is that when a corporation combines with another so as to lose its essential nature and alter the original fundamental relationships of the shareholders among themselves and to the

> corporation, a shareholder who does not wish to continue his membership therein may treat his membership in the original corporation as terminated and have the value of his shares paid to him.

Farris v. Glen Alden Corp., supra, 393 Pa. at 433, 123 A. 2d at 29. Thus, whether or not the formal merger procedures are followed, the appraisal rights embodied in section 805 should be enforced if a transaction alters the "fundamental relationships" among a corporation and its investors. This altering of "fundamental relationships" is the attribute of merger which triggers the applicability of section 805 appraisal rights.

If, in protecting dissenting shareholders, a court should scrutinize a corporate transaction to ascertain the presence of certain attributes of merger relevant to the enforcement of appraisal rights, it should do no less in protecting tort claimants. Both dissenting shareholders under section 805 and tort claimants under section 803 are the intended beneficiaries of protective legislation. Although a transaction should be scrutinized to protect both shareholders and tort claimants, a court should search for somewhat different attributes of merger for purposes of imposing tort liability. This difference in relevant attributes stems from the distinct relationships to the corporation of the persons whom the legislature has sought to protect. While dissenting shareholders need protection against alteration of their investment rights, tort claimants need protection against attempts by ongoing businesses to avoid liability through transfer of their operations to another legal entity.

I believe that, where a corporation purchases substantially all the assets of a second corporation, the legislature intended to impose the second corporation's tort liabilities on the acquiring corporation at least if the following attributes of merger are present:

(1) an ongoing business, including its name and

good will, is transferred to the acquiring corporation; and

(2) the corporation whose assets are acquired is dissolved after distribution to its shareholders of the consideration received from the acquiring corporation.

In the present case, TMW transferred to Rockwell almost all its assets, retaining only its corporate records and a limited amount of cash to effectuate the transaction.[1]

---

1. The "Agreement and Plan of Reorganization" provided that TMW shall convey, transfer, assign and deliver to [Rockwell] . . . all the property and assets, tangible and intangible, of every kind, nature and description and wherever situated, owned, possessed or held by TMW on the Closing Date (hereinafter referred to in Paragraph 5) including, but not limited to, TMW's land and leaseholds as described in Exhibit A-1 attached hereto, improvements, buildings, machinery, equipment and other fixed assets, real and personal, and rights appurtenant thereto, furniture, fixtures, business machines, vehicles, inventories, supplies, work in process, semi-finished products, patents, trademarks, licenses, trade names, copyrights, securities, investments, leasehold interests, options to purchase real or personal property, rights under contracts, insurance policies, cash on hand and in banks, accounts and notes receivable, claims, right, choses in action, permits or licenses to conduct its business as now carried on, business as a going concern, shares of stock in other corporations, good will and all rights to use to the exclusion of TMW the name "Textile Machine Works" or a name or names similar thereto, except, however, the following, which shall be retained by TMW:

(a) TMW's corporate seal, articles of incorporation, minute books, stock books and other corporate records; and

(b) $500,000 in cash to cover the costs and expenses of TMW (in such amounts as shall be agreed upon in writing by NR and TMW at or before the Closing) in connection with the transactions constituting the Plan of Reorganization under this Agreement, any payments to TMW preferred shareholders who demand cash for their shares, and all taxes on the transfer of any of the assets or properties to NR hereunder. Any balance of such sum remaining upon the dissolution of TMW shall be paid to NR at such time.

The "Agreement and Plan of Reorganization" specifically provided for the transfer of TMW's business "as a going concern," including good will, the exclusive right to use the name "Textile Machine Works," and the "permits or licenses to conduct [TMW's] business as now carried on." TMW also agreed to change its name and dissolve. In this regard, the "Agreement and Plan of Reorganization" provided that,

> [o]n the Closing Date, TMW shall take all action required to change its name to "T. W. Company" ("TW") . . . . As soon as practicable after the last [liquidating distributions to its shareholders of Rockwell stock], TW shall wind up its affairs and dissolve. From and after the Closing Date, TW shall not engage in any business or other activity except as required to carry out the terms of this Agreement and to complete its liquidation and dissolution as provided herein.

In addition, this transaction has another characteristic of a statutory merger. The consideration given for TMW's assets was Rockwell stock, which in turn was to be distributed to TMW's shareholders on TMW's liquidation and dissolution. Thus, TMW shareholders became shareholders in Rockwell just as if they had exchanged their shares directly with Rockwell under the statutory merger procedure. *See* 15 P.S. §801.

On the basis of the foregoing I am persuaded that the Pennsylvania courts would consider this transaction a merger within the intendment of section 803. This I believe they would do even though the transaction was structured as a sale and even though TMW had not fully wound up its affairs and dissolved until 18 months after the combination. TMW actually had ceased to function as a going concern when the sale was consummated. Only a corporate shell remained, engaged solely in the process of winding up and dissolution.

While I recognize the rightful prerogative of a corporation to rearrange its business or go out of business en-

tirely, there is also a practical and reasonable basis for construing this transaction as a merger. Were we in the circumstances of this case to absolve of liability a corporation which acquires a functioning business by purchasing substantially all the assets of another corporation, many injured parties would be unable to maintain products liability actions[2] after the former corporate owner of the business has been dissolved. Although by statute Pennsylvania corporations are amenable to suit for two years after dissolution, a defect in a product manufactured by a dissolved corporation may not come to light until long after the two-year period. *See* 15 P.S. §2111. Because the statute of limitations generally does not begin to run until the defect is discovered, such an action probably would not be time-barred.

In imposing liability for the torts of the acquired corporation, I realize that the acquiring corporation was not a party to any tortious act and had no connection with the acquired corporation at the time the allegedly defective product was manufactured. The acquiring corporation, however, is in a position both before and after the acquisition to take necessary measures for its protection against potential products liability claims.

I do not express, nor does the majority, any opinion concerning the merits of the tort claim which we today permit plaintiff to bring against Rockwell.

---

2. In 1970 the President's Commission on Product Safety [reported that] [s]ome 20 million Americans are injured each year as a result of incidents connected with consumer products. [Final Report of the National Commission on Product Safety (June, 1970), Lib. Cong. No. 76-600753.] Incidents connected with industrial products account for an additional 7 million injuries each year. [The President's Report on Occupational Safety and Health (May, 1972).] Personal injuries are the primary source of the burgeoning number of product liability cases entering our courts.

Weinstein, Twerski, Piehler, & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 Duquesne L. Rev. 425 (1974).

I would reverse the judgment of the district court and remand for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1110

STANLEY KNAPP, Jr., *Appellant*

v.

NORTH AMERICAN ROCKWELL CORPORATION

v.

MRS. SMITH'S PIE COMPANY,
(3rd-party defendant)

(D. C. Civil Action No. 71-668)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, ADAMS and ROSENN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 6, 1973, and the order of the said District Court, filed November 26, 1973, be, and the same are hereby reversed, and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

Attest:

Clerk

December 27, 1974

ADDENDUM

Federal Rules of Civil Procedure, Rule 6

Rule 6. Time.

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed in less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) UNAFFECTED BY EXPIRATION OF TERM. (Rescinded)

(d) FOR MOTIONS—AFFIDAVITS. A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Federal Rules of Civil Procedure, Rule 59

RULE 59. New Trials; Amendment of Judgment.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rules of Appellate Procedure, Rule 4

RULE 4. Appeal as of Right—When Taken

(a) APPEALS IN CIVIL CASES. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within

the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

(b) APPEALS IN CRIMINAL CASES. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion

for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

15 Purdons Statutes §2111

§2111. Survival of Remedies and Rights After Dissolution.

A. The dissolution of a business corporation, either by the issuance of a certificate of dissolution by the Department of State, or by the decree of a court of common pleas, when the court has not liquidated the assets and property of the corporation, or by expiration of its period of duration, or by the sale of all its franchises, property and assets to another business corporation, shall not take away or impair any remedy given against such corporation, its directors or shareholders, for any liability incurred prior to such dissolution, if suit thereon is brought and service of process had before or within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name.

B. The dissolution of a business corporation shall not take away or impair any property right, tangible or intan-

gible, including any right of action, of such corporation. Should any such property right be discovered after the dissolution of the corporation, the surviving member or members of the board of directors which wound up the affairs of the corporation, or a receiver appointed by the court of common pleas of the county in which the registered office of the corporation was located, shall have authority to enforce such property right and to collect and divide its assets so discovered among the persons entitled thereto and to prosecute suits in the corporate name of the corporation. 1933, May 5, P.L. 364, art. XI, §1111; 1939, June 24, P.L. 698, §4; 1957, July 11, P.L. 711, §1.

12 Purdons Statutes §31

Personal Actions

§31. Personal Actions, When to be Brought

All actions of trespass quare clausum fregit, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), all actions of debt grounded upon any lending, or contract without specialty, all actions of debt, for arrearages of rent, except the proprietaries' quit-rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle, and the said actions of trespass quare clausum fregit within three years after the

said five and twentieth day of April next, or within six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within one year next after the said five and twentieth day of April next, or within two years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year next after the words spoken, and not after. 1713, March 27, 1 Sm.L. 76, §1.

SUPREME COURT, U. S.

APR 24 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1211.

NORTH AMERICAN ROCKWELL CORP.,
Petitioner,

and

MRS. SMITH'S PIE CO.,
Third-party Defendant,

v.

STANLEY KNAPP, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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MRS. SMITH'S PIE CO.,
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v.

STANLEY KNAPP, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Stanley Knapp, Jr., respectfully prays that petitioner's application for a Writ of Certiorari to review the final judgments of the United States Court of Appeals for the Third Circuit, entered on February 27, 1974 and December 27, 1974 be denied.

OPINIONS OF THE COURTS BELOW.

The Opinion of the District Court is unreported but is printed in the Petition for Writ of Certiorari, from p. 8a to p. 12a. The Opinion of the Court of Appeals for the Third Circuit and the concurring Opinion are unreported but printed in the Petition for a Writ of Certiorari, from p. 23a to p. 45a.

JURISDICTION.

This Court does not have jurisdiction of Question I of the Petition as it is out of time to file a Petition for Writ of Certiorari in March of 1975 questioning an Order entered by the United States Court of Appeals for the Third Circuit on February 27, 1974.

Jurisdiction as to Question II of the petitioner is invoked under 28 U. S. C. § 1254(1).

COUNTER STATEMENT OF THE QUESTIONS PRESENTED.

1. Whether petitioner filed a timely Petition with this Court questioning the jurisdiction of the Court of Appeals, and, if answered in the affirmative, whether the appeal filed by respondent in the Court of Appeals was timely?

2. Whether the Court of Appeals was in error in reversing the grant of Summary Judgment in the District Court on the ground that one injured by a defective machine may recover from the corporation that had purchased substantially all the assets of the manufacturer of the machine because the transaction was a merger or a consolidation rather than a mere sale of assets?

COUNTER STATEMENT OF THE CASE.

1. Procedural.

This diversity matter was instituted pursuant to 28 U. S. C. § 1332 and is a products liability action brought by respondent, Stanley Knapp, Jr., a Pennsylvania resident, against petitioner, North American Rockwell Corp., a Delaware Corporation.

On June 19, 1973, petitioner filed a Motion for Summary Judgment. On June 19, 1973 the Motion was granted by an Order entered on September 6, 1973 (1a).[1] On October 5, 1973, respondent's Motion for Rehearing and Reconsideration was served on opposing counsel and docketed on October 11, 1973 (1a). That Motion was denied by an Opinion and Order dated November 21, 1973 and docketed November 26, 1973 (1a). On December 14, 1973, that Order was appealed to the United States Court of Appeals for the Third Circuit and received by the Court of Appeals on December 19th (Petition, 5a). On January 23, 1974, petitioner filed a Motion to Dismiss the Appeal on the grounds that it was untimely (Petition, 5a). On January 30, 1974, respondent filed an Answer and Memorandum of Law Contra the Motion to Dismiss the Appeal (Petition, 5a), and on February 25th, the Motion to Dismiss the Appeal was submitted to the Court. The Coram was Hunter, Weis and Miller, D. J. (Petition, 5a), and on February 27th, an Order was entered by Judge Hunter denying the Motion to Dismiss the Appeal for lack of jurisdiction (Petition, 5a).

The Briefs of the petitioner and respondent on the merits were thereafter filed with the Court of Appeals for the Third Circuit (Petition, 6a), and on September 10,

1. All page references are to the Joint Appendix on Appeal to the United States Court of Appeals for the Third Circuit, unless otherwise noted.

1974, the matter was argued before Judges Aldisert, Adams, and Rosenn (Petition, 6a). On December 27, 1974, the opinion of the Court was filed reversing the judgment of the District Court, filed September 5, 1973, and the order of the District Court, filed November 26, 1973, and remanding the cause for further proceedings consistent with the opinion of the Court of Appeals (Petition 6a).

The petitioner thereafter filed a Petition for Writ of Certiorari.

II. Factual.

Respondent, Stanley Knapp, Jr., an employee of Mrs. Smith's Pie Company, third-party defendant, was seriously and permanently injured on October 6, 1969, when his hand was caught in a machine known as a "Packomatic". It is the contention of the respondent that the machine was negligently designed and manufactured. The machine had been designed, manufactured and sold by the Textile Machine Works (hereinafter identified as TMW) to Mrs. Smith's Pie Company in 1966 or 1967.

On April 5, 1968, TMW entered into an agreement with petitioner whereby TMW exchanged substantially all of its assets for stock in the petitioner. TMW retained only its corporate seal, its Articles of Incorporation, its Minute Books and other corporate records, and $500,000 in cash intended to cover TMW's expenses in connection with the transfer. Any of the $500,000 remaining at the time of the dissolution of TMW was to be returned to the petitioner. Included in the assets acquired by the petitioner was the right to use the name "Textile Machine Works." On the closing date, TMW was to change its name, distribute petitioner's stock to its shareholders and to dissolve "as soon as practicable after the last of such distributions" (11a).

The agreement reached by petitioner and TMW also stipulated that petitioner would assume specified obligations and liabilities of TMW, and certain other "obligations" (88a), but among the liabilities not assumed were: "(a) Liabilities against which TMW is insured or otherwise indemnified to the extent of such insurance or indemnification unless the insurer or indemnitor agrees in writing to insure and indemnify (petitioner) to the same extent as it was so insuring and indemnifying TMW." (88a).

Closing took place pursuant to the agreement on August 29, 1968 (89a). Thereafter, respondent was injured and sued petitioner to recover for his personal injuries on the ground that the transaction between petitioner and TMW was a merger or consolidation, not a mere sale of assets, thus subjecting petitioner to liability.

Although petitioner could have joined TMW in the instant litigation, it did not do so. Respondent did not and has not brought a viable action against TMW in any other court. Petitioner did, however, join respondent's employer, Mrs. Smith's Pie Company, as a third-party defendant, but, as previously stated, did not join TMW, the company petitioner now claims was the proper party to sue.

Petitioner raises two questions: 1. That the Appeal was untimely to the Court of Appeals and that Court, therefore, lacked jurisdiction; 2. That the Court of Appeals improperly reversed the grant of Summary Judgment by the District Court.

Respondent's Appeal to the Court of Appeals was timely and the decision of the Court of Appeals was proper both as to the timeliness of the Appeal to it and in reversing the Judgment of the District Court.

REASONS WHY THE WRIT SHOULD BE DENIED.

The issues in the present case are uniquely narrow, and, the petitioner's arguments notwithstanding, it is difficult to conceive that the issues warrant review by this Court on Certiorari.

First, this Writ, insofar as it addresses itself to alleged error of the Court of Appeals' refusal to dismiss the Appeal to it as untimely, is itself untimely.

The petitioner, on January 23, 1974, filed a Motion to Dismiss the Appeal of the respondent in the Court of Appeals, alleging lack of jurisdiction (Petition, 5a). On January 30, 1974, respondent filed his Answer to the petitioner's Motion to Dismiss the Appeal in the United States Court of Appeals for the Third Circuit, and a Memorandum of Law Contra to the Motion to Dismiss (Petition, 5a). On February 25, 1974, the United States Court of Appeals for the Third Circuit listed the matter for consideration before the Honorable Judges Hunter and Weis of the United States Court of Appeals for the Third Circuit and Judge Miller from the United States District Court (Petition, 5a). On February 27, 1974, the Honorable James Hunter, III, of the United States Court of Appeals for the Third Circuit, denied the Motion of the petitioner to dismiss the Appeal of the respondent for lack of jurisdiction (Petition, 5a).

The time to file a Writ of Certiorari is governed by 28 U. S. C. § 2101(c):

* * *

> "Any . . . Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review, shall be taken or applied for within ninety days after the entry of such judgment or decree . . ."

* * *

Since the Order denying the Motion to Dismiss the Appeal was entered on February 27, *1974* (Petition, 5a), a Writ of Certiorari filed on March 25, *1975* is obviously far beyond the ninety days permitted by 28 U. S. C. § 2101(c), and the Appeal is, therefore, out of time. An application for Certiorari must be made within the time limited, *Bradford Electric Light Company, Inc. v. Clapper,* 1931, 52 S. Ct. 118, 284 U. S. 221, 76 L. Ed. 135.

Further, it was the decision of the United States Court of Appeals for the Third Circuit that the entire matter be remanded to the United States District Court for the Eastern District of Pennsylvania for trial and the case, therefore, does not have a final Order in its totality. Except in extraordinary cases, a Writ of Certiorari is not issued until a final decree. *Hamilton-Brown Shoe Company v. Wolf,* Mo. 1916, 36 S. Ct. 269, 240 U. S. 251, 60 L. Ed. 629. This is not an extraordinary case.

Respondent, Stanley Knapp, Jr., respectfully prays that petitioner's application for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit on the basis that the Court of Appeals erred in accepting the appeal as timely be denied.

Assuming, *arguendo,* the timeliness of the Appeal is before this Court, then the United States Court of Appeals for the Third Circuit properly decided the Appeal to it was timely.

On June 18, 1973, the petitioner filed a Motion for Summary Judgment in the United States District Court for the Eastern District of Pennsylvania (82a). An Order was signed granting Summary Judgment on September 5, 1973, by the Honorable United States District Court judge E. Mac Troutman (103a), and was entered on the docket in the District Court on September 6, 1973 (101a). Respondent, thereafter, prepared a Motion for Reconsidera-

tion and Rehearing, which, according to the Federal Rules of Civil Procedure, was due on September 17, 1973. (The Order entering Judgment was docketed on September 6th. The Motion under Rule 59(e) F. R. C. P. to be timely must be filed within ten days or September 16th, which was a Sunday, therefore, the Motion was due the next day, September 17th.)

The morning that the Motion was due to be filed, respondent's attorney received a call from the chambers of Judge Troutman stating that the case was No. 3 in the trial pool. Faced with the dilemma of the prospect of an immediate assignment for trial and an Order in a Motion for Summary Judgment, respondent's counsel telephoned Judge Troutman, but was connected with the Judge's law clerk. The problem was discussed with the Judge's law clerk, who then advised respondent's counsel that he would confer with the Judge, and the law clerk then came back on the telephone, and advised respondent's counsel that the Judge had agreed until the attorneys involved were told whether the case was to be tried before a jury or whether the Motion for Summary Judgment had in fact been granted dismissing the case, the time for filing the Petition for Reconsideration would be enlarged.

That conversation was confirmed by a letter that same day, September 17th (Petition, 21a). The language in the letter (Petition, 21a), was couched in a tactful and respectful tone confirming the granting by the United States District Court Judge of an extension of time for filing the Petition for Reconsideration.

At no time did the attorney for the petitioner object to the letter of September 17, 1973, for the principle for which it stood (enlarging the time for filing the Petition for Reconsideration) until the Motion to Dismiss the Appeal was filed in the United States Court of Appeals on

January 23, 1974. Since the time for a direct appeal to the United States Court of Appeals for the Third Circuit had not yet expired as of September 17, 1973, an appropriate objection of the extension of time made by the attorney for the Petitioner, assuming, *arguendo*, that the District Court Judge did not have the power to enlarge the time to file, would have resulted in simply an appeal being taken directly to the Third Circuit rather than give the trial judge the opportunity to reconsider the granting of the Summary Judgment, or if even more time passed, an application in accordance with Rule 4 of the Federal Rules of Appellate Procedure.

Respondent's Motion for Reconsideration and Rehearing was served on counsel for the petitioner on October 3, 1973. (But docketed on October 11, 1973, in accordance with the Local Rules of the Eastern District of Pennsylvania.)

An Order denying the Motion for Reconsideration and Rehearing was signed by the trial judge on November 21, 1973, and that Order was docketed on November 27, 1973 (1a & 2a).

On December 14, 1973, respondent filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit, appealing the Order of November 21, 1973, which refers to the Order docketed September 6, 1973 (1a & 2a, Petition 5a).

The argument of the petitioner to this Court states that the appeal to the Court of Appeals was not timely, and has three aspects: That the denial of a Motion for Rehearing is not appealable; a Motion for Rehearing and Reconsideration is considered a Motion under Rule 59(e) F. R. C. P. for purposes of tolling the time for appeal; and a Rule 59(e) F. R. C. P. Motion does not toll the appeal period unless timely filed.

Respondent agrees that the denial of the Motion for Rehearing and Reconsideration is not appealable. It is the original Order that is appealable, no matter what the appeal is called or styled. *Gainey v. Brotherhood of Railway & Steamship Clerks,* 303 F. 2d 716 (3rd Cir. 1962).

Respondent also agrees that a Motion for Rehearing and Reconsideration is a Rule 59(e) F. R. C. P. Motion (or a Rule 60 F. R. C. P. Motion). *Gainey v. Brotherhood of Railway & Steamship Clerks, supra.*

What is crucial, then, is whether the Motion of the respondent for Rehearing and Reconsideration was timely, for if it was, then the appeal to the United States Court of Appeals for the Third Circuit was timely.

Rule 58 F. R. C. P. ties an appeal in to the entry of the judgment on the docket; before a judgment can become effective, it must be entered on the docket, and the appeal period does not begin to run until it is entered on the docket. *Levin v. Wearever Aluminum, Inc.,* 427 F. 2d 847 (3rd Cir. 1970).

A Motion for Rehearing and Reconsideration must be served within ten days of the entry of an Order on the docket. Rule 6, 58, 59(e), F. R. C. P.; U. S. District Court for the Eastern District of Pennsylvania, Local Rule 37.

The Order of the United States District Court Judge was docketed on September 6, 1973, and the ten day service period began to run, therefore, in accordance with Rule 6, F. R. C. P., the day after, or September 7th. The ten day service period expired on September 16th, but since that was a Sunday, in accordance with Rule 6 F. R. C. P., that day did not count in the ten day period, and the last day to serve the Motion became September 17, 1973.

On September 17, 1973, the day the Motion was to be served, the Court called to say that the case which had supposedly been dismissed because of a Motion for Sum-

mary Judgment, was No. 3 in the trial pool and ready for immediate assignment. Because of the dilemma that confronted counsel for your respondent, the letter of September 17, 1973, was mailed after the telephone conversation above described was completed (Petition, 21a).

As noted, the law clerk to the District Court judge discussed the problem with the trial judge, and advised respondent's counsel that it was the opinion of the Court that the Petition for Reconsideration filing time would be enlarged if the District Court Judge decided the case was not No. 3 in the pool. As soon as word was conveyed to respondent's counsel that the Motion for Summary Judgment had, in fact, been granted, the Motion for Rehearing and Reconsideration was served on the petitioner on October 3, 1973.

Service of the Motion was in accordance with Rule 5(b) and (d) F. R. C. P. and the United States District Court for the Eastern District of Pennsylvania Local Rule 36, and the Motion was filed with the Clerk of the United States District Court, in accordance with Local Rule 36, on October 11, 1973.

The Motion was accepted by the Court, and the Court requested a Reply Brief from the petitioner, which was complied with by the petitioner. The Court then reconsidered the matter and signed an Order dismissing the Motion, drafted a Memorandum Opinion dated November 21, 1973, and that Opinion and Order was docketed on November 27, 1973. Up to this time, the petitioner did not object to the procedure in question.

Respondent appealed to the United States Court of Appeals for the Third Circuit on December 14, 1973 (received by the Court on December 19, 1973 (Petition, 5a)), from the Order denying Reconsideration and Rehearing, which is actually an Appeal from an Order dismissing the

case. *Gainey v. Brotherhood Railway & Steamship Clerks, supra.* The essential issue then boils down to whether the Motion for Rehearing and Reconsideration was filed on a timely basis, and the answer is clearly yes.

The Motion for Rehearing and Reconsideration was filed after the ten day period in reliance on an official act of the District Court which was inconsistent with the granting of a Motion for Summary Judgment, i.e., listing the case for trial, and in specific reliance on the District Court Judge's assurances that if the case was not to be called for trial as a result of granting the Motion for Summary Judgment, then the Judge would grant an interim enlargement of the filing period for the Motion for Reconsideration and Rehearing.

Normally, an untimely Motion for Reconsideration is nulity and does not toll the time in which to appeal. The exception to that rule, as stated in *MacNeil Brothers Co. v. Cohen,* 264 F. 2d 190, 193 (1st Cir. 1959), is:

> "The only exception to this general proposition has been fashioned to cover situations in which the movant has been induced to forego filing his notice of appeal within thirty days by some action by the District Court indicating that the post-judgment motion was timely filed, when in fact it was not."

United States v. Merrick, 464 F. 2d 1087 (1st Cir. 1972). See also *Wolfsohn v. Hankin,* 376 U. S. 203, 84 S. Ct. 699, 11 L. Ed. 2d 404 (1964); *Harris v. Cherry Meat Packers, Inc.,* 371 U. S. 125, 9 L. Ed. 2d 61, 83 S. Ct. 283 (1962).

Since the respondent had most definitely been induced to forego filing his Motion for Reconsideration within ten days, and his Notice of Appeal within thirty days, by official action of the District Court indicating that the Post-Judgment Motion was timely filed, then the filing of the Appeal

became timely, and fits squarely within the letter and spirit of the Supreme Court decisions on this very issue. The Appeal was, therefore, properly and timely filed with the United States Court of Appeals; this very same issue had properly and previously been decided by the United States Court of Appeals in the instant case, i.e., that the appeal to the United States Court of Appeals for the Third Circuit was properly and timely filed.

WHEREFORE, respondent, Stanley Knapp, Jr., respectfully prays that Petitioner's Application for Writ of Certiorari to review the issue of whether the appeal was timely filed with the United States Court of Appeals for the Third Circuit be denied.

Next petitioner wants this Court to believe that the decision of the Court of Appeals presents a matter of overwhelming significance. This is not so. They state that the effect of the ruling would strongly limit the purchase and sale of businesses. That simply is not true. As aptly pointed out by the Court of Appeals, insurance is available to cover these contingencies, and, in fact, the insurance did exist in the instant case, and, in fact, petitioner purchased all of the assets, including the insurance (4a). There are many other avenues and alternatives that would permit one corporation to purchase the assets of another corporation and not subject the purchasing corporation to the liabilities of the selling corporation. The only reason that the petitioner purchased the assets rather than the shares of stock of the selling corporation (and limit its liability by only purchasing the shares of stock) was to bring itself within Section 368(a)(1)(c) of the Internal Revenue Code of 1954 so as to allow the buying corporation to issue its stock rather than cash and so that the exchange would be tax-free to shareholders of the selling corporation. Substantial benefits under the laws and statutes of the United

States inured to both parties as a result of this transaction in that the petitioner did not divest itself of any substantial cash in the transaction, other than to consummate the transaction, and the shareholders of the selling corporation were not taxed on their gain. If parties intelligently exercise the advantages of the structuring a transaction this way, then they should not complain of potential disadvantages that may accrue. Further, not all acquisitions will have the result of imposing liability on the purchaser, but only in the *specific unique circumstances in the instant case,* as outlined in the Opinion of the Third Circuit.

The respondent, before the United States Court of Appeals for the Third Circuit, argued that the transaction between the petitioner and TMW amounted to a *de facto* merger and, therefore, imposed liability on petitioner for damages caused by machines manufactured by its predecessor. The petitioner, however, states at page 13 of its Writ to this Court that:

> "The Court of Appeals analyzed numerous decisions decided under jurisdictions other than Pennsylvania and concluded that they 'suggest that the arrangement between Rockwell and TMW should be considered a sale rather than a merger or a continuation . . .'"

However, that is a cleverly stated half-truth, because a review of the Opinion (Petition, 32a) clearly shows that the United States Court of Appeals for the Third Circuit did not say that. What the Court said was:

> "The cases discussed above, all decided under the law of jurisdictions other than Pennsylvania, MAY suggest that the arrangement between Rockwell and TMW should be considered a sale rather than merger or a continuation . . . However, a number of considera-

tions indicate the insubstantially of the continued existence of TMW, including the brevity of the corporation's continued life, the contractual requirements that TMW be disvolved as soon as possible, the prohibition of engaging in normal business transactions, and the character of the assets TMW controlled. Although each of these factors was present in one or more of the above cases, the present Appeal is unique in combining all these elements. In addition, the better reasoned result would be to conclude that, for the purpose of determining liability to tortiously injured parties, the Rockwell-TMW transaction should be treated as a merger, and thereby subjecting Rockwell to liability for injuries caused by defective products distributed by TMW prior to that transaction." (Petition, 32a & 33a) (Emp. supplied)

Not only was that the position stated by the majority of the Court, but a concurring Opinion was also filed reaching the same result (Petition, 41a).

The United States Court of Appeals in reaching the decision it did in this case, looked to the unique aspects of this transaction wherein the petitioner acquired substantially all of the assets of the selling corporation, and the Court was not to be fooled by ignoring the substance of the transaction, and concluded that the Pennsylvania Courts also would not be fooled and would also look to find a cause of action in favor of an injured party. The United States Court of Appeals for the Third Circuit based only in part their decision on Pennsylvania public policy, by stating that public policy is better served by imposing liability on a defendant rather than permitting the petitioner here to raise formal, technical requirements to avoid liability (Petition, 33a). Therefore, the Court of Appeals decided this

case in favor of the respondent on the very firm basis of the facts unique to this case, and, therefore, the holding in this case does not contain very important questions of federal law.

The petitioner also misstates what *Granthum v. Textile Machine Works,* 230 Pa. Supr. Ct. 199 (1974), holds. The Pennsylvania appellate court in that case did consider the very same transaction between petitioner and TMW. The full caption of the case was *Helen Granthum, Appellant v. Textile Machine Works, North American Rockwell and Microswitch.* The plaintiff there brought suit against TMW which manufactured the machine, and North American Rockwell (petitioner here), who she claimed was also responsible under the theory that Rockwell became the successor corporation. The Pennsylvania Superior Court reversed the lower court (which granted a Summary Judgment letting North American Rockwell out of the case), by saying that the lower court acted prematurely in making a determination that no issue of fact existed as to (North American) Rockwell's transaction.[2]

Further, the Pennsylvania Superior Court emphasized that the language of North American Rockwell agreement agreed to accept liability for "obligations", and the Pennsylvania Superior Court questioned whether on the day of the agreement, Textile had "an obligation" with regard to future tort claimants which "obligation" Rockwell assumed, thereby subjecting Rockwell to liability.

Granthum v. Textile Machine Works and North American Rockwell, supra, matter was decided September 23, 1974; and the United States Court of Appeals for the Third Circuit decided the instant case on December 27, 1974; even

2. Pennsylvania law is that a Summary Judgment is to be entered only in the clearest of cases where there is not the slightest doubt as to the absence of a triable issue of material fact. *Prince v. Pavoni,* 225 Pa. Supr. Ct. 286, 302 A. 2d 452 (1973).

though the same attorneys represented North American Rockwell in both cases, they did not bother to send the Opinion, which it should have had at that time from the Pennsylvania Superior Court, to the Third Circuit, but decided only to advise this Court of a very narrow aspect of *Granthum* opinion which is helpful to it, rather than advise this Court that Pennsylvania Superior Court, in a very similar factual situation, infers that they seem to reach the same result that the United States Court of Appeals for the Third Circuit reached, but for different reasons. *Granthum v. Textile, supra,* at p. 203:

> "Lastly, we note that a question of fact may exist as to the meaning of the term 'obligations' which Rockwell expressly assumed . . ."

The decisions reached in the Court of Appeals are correct. There are no conflicts of decision between the Court of Appeals on this issue, given the unique facts of this case, and respondent's arguments both above and in his brief in the Court of Appeals are meritorious.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.